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# Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict

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# ARTICLES

# PRINCIPLED DECISION MAKING AND THE PROPER ROLE OF FEDERAL APPELLATE COURTS: THE MIXED QUESTIONS CONFLICT

EVAN TSEN LEE*

## I. INTRODUCTION

A troublesome and divisive conflict among the federal circuits today is the question of how much deference an appellate court must accord district court findings on so-called mixed questions of law and fact.[1] The Supreme Court has defined a mixed question as one asking "whether the rule of law as applied to the established facts is or is not violated."[2] A mixed question, then, simply presents the decision maker with the task of applying the law to the facts of the case. One group of circuits generally reviews findings on such questions on a non-deferential, de novo basis;[3] another group generally reviews them on a highly-deferential, "clearly erroneous" basis;[4] a third group varies the standard of review depending

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1. *See* Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982). The Court there defined mixed questions of law and fact as "questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated."

2. *Id.*

3. *See infra* notes 38-59 and accompanying text.

4. *See infra* notes 24-37 and accompanying text.

on the "mix" of the question;[5] and a fourth group has yet to establish a clear pattern.[6] The Supreme Court, despite clear opportunity, has never undertaken to resolve the conflict.[7]

Why should this conflict be so difficult to resolve? For one, the very recognition of a discrete category of "mixed questions of law and fact" suggests an ambivalence about who ought to have primary responsibility for such decisions. After all, the labels "law" and "fact" often amount to little more than divisions of decision making authority between judges and juries or between appellate courts and trial courts.[8] If such questions were clearly more suitable for decision by appellate courts than by trial courts, or vice versa, we probably would not recognize them as a separate category. They would simply be questions of law or questions of fact.

Perhaps the conflict is so difficult to resolve because, from the perspective of an appellate court, it seems to sit precisely at the midpoint between the Scylla of allowing errors to go uncorrected and the Charybdis of judicial inefficiency. Too much deference and the court fails to fulfill its duty to ensure that justice is done; not enough deference and it will be sucked into a whirlpool of unending review of fact patterns too peculiar to recur. Given the intractability of this dilemma, it is understandable that the circuits have chosen different courses. So long as these clearly opposing considerations are the only factors influencing the choice between standards of review, it would be unrealistic to expect one circuit's grudging acceptance of one standard to generate much enthusiasm in other circuits, or to expect the Supreme Court to break inertia and resolve the conflict.

Certain Supreme Court cases, however, can be read to suggest that the conflict ought to be resolved in favor of deferential review. The Seventh Circuit seems to have realized this and has quite emphatically adopted the highly deferential, "clearly erroneous" standard of review over mixed questions.[9] Its rationale was that the exercise of applying a rule to the facts of a particular case does not implicate the central function of an appellate court—to exercise control over the development of

5. *See infra* notes 60-70 and accompanying text.

6. *See infra* notes 71-87 and accompanying text.

7. *See Pullman-Standard*, 456 U.S. 273.

8. *See* Weiner, *The Civil Nonjury Trial and the Law-Fact Distinction*, 55 CALIF. L. REV. 1020, 1022 (1967) ("Since law application cannot be meaningfully described as either lawmaking or fact-finding, such terminology is not a useful analytical tool in answering the question confronting the court.").

9. *See infra* notes 32-37 and accompanying text.

law.[10] Standing alone, this explanation might not seem urgent enough to persuade other circuits to adopt the "clearly erroneous" standard; in fact, none has yet followed suit.[11] Furthermore, it does not solve the formalistic riddle of what is "law" and what is "fact." But if the Seventh Circuit's choice is viewed not just as another vote in favor of efficiency, but rather as implicitly defining the proper function of appellate courts, then it offers a final resolution of the conflict in favor of a generally deferential standard of review. This Article is an attempt to view the Seventh Circuit's decision in such a manner; to show how its restrictive definition of the appellate role is implied by Supreme Court decisions; and to demonstrate why this definition of appellate court functions militates in favor of the "clearly erroneous" standard of review over mixed questions.

This Article is divided into four parts. The first part surveys the circuits to determine which ones have developed consistent standards of review of mixed questions, and what those standards are. Second, the Article argues that the Seventh Circuit's decision in favor of "clearly erroneous" review embraces a definition of appellate review under which appellate decision making must be either "principled"[12]—i.e., capable of producing meaningful precedent—or deferential to trial court findings. Third, the Article demonstrates that this definition of appellate review is implicit in two distinct lines of Supreme Court authority—the appellate fact-finding cases of the 1980s and the remedial holdings of school desegregation cases from the 1970s. The Article concludes by using a concrete set of facts from a particular case to illustrate why this restricted definition of the appellate function requires "clearly erroneous" review over most so-called mixed questions.

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10. *See infra* note 31 and accompanying text.

11. The First Circuit had adopted the "clearly erroneous" standard prior to the Seventh Circuit. *See infra* notes 24-27 and accompanying text.

12. Here I have done little more than reduce to shorthand Professor Wechsler's famous injunction against ad hoc judicial decision:

> [T]he main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved. To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed?

Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

## II. THE CONFLICT SURVEYED

As noted above, the Supreme Court has defined a mixed question as one that requires the decision maker to apply law to facts.[13] Put another way, when examining a mixed question, a judge must perform the same task asked of law students in their examinations—that is, ascertain the legal significance of relevant historical facts as liquidated.[14] The question that has confounded the circuits is this: Once the district court has performed the task of applying the law in the first instance, should the appellate court review the results on a deferential or non-deferential basis?

By the terms of Federal Rule of Civil Procedure 52(a), the "clearly erroneous" standard applies to "pure" questions of fact,[15] while it has long been clear that "pure" questions of law are to be reviewed under a de novo standard.[16] Though the Federal Rules of Civil Procedure generally apply only to civil cases, it is universally assumed that the "clearly erroneous" standard governs review of "pure" questions of fact in federal criminal cases as well.[17] The question is whether the "clearly erroneous" standard applies to the review of district court findings of *mixed* questions of law and fact in both civil and criminal cases in federal court.[18] The circuits are in disarray on this question, with conflicts not only between circuits but within them. The circuits fall into four categories: those whose general rule is to review mixed questions under the "clearly erroneous" standard; those whose general rule is to review mixed questions under a de novo standard; those whose general rule is to review mixed questions under a variable standard that attempts to characterize each question as essentially one of law or fact; and those where no discernable pattern has emerged. Omitted from this survey are cases in three areas that appear to be covered by special nationwide rules: constitutional fact review,[19] review of state court decisions in federal habeas

13. *See supra* text accompanying note 2.

14. Juries, of course, are routinely called upon to perform the task of law application. Rule 52(a), however, speaks only to civil nonjury trials. *See* FED. R. CIV. P. 52(a).

15. *See infra* note 145.

16. *Pullman-Standard*, 456 U.S. at 287 ("The Rule does not apply to conclusions of law.").

17. *See, e.g.*, United States v. Mendenhall, 446 U.S. 544 (1980); United States v. Campbell, 843 F.2d 1089 (8th Cir. 1988); United States v. Hurtado, 779 F.2d 1467 (11th Cir. 1985); United States v. McConney, 728 F.2d 1195 (9th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 824 (1984).

18. Mixed questions are also sometimes referred to as questions of "ultimate fact." *See Pullman-Standard*, 456 U.S. at 286 n.16 (Ultimate fact is the "legally determinative consideration . . . which is or is not satisfied by subsidiary facts admitted or found by the trier of fact.").

19. *See* Bose Corp. v. Consumers Union, 466 U.S. 485 (1984); Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of*

corpus cases,[20] and Rule 11 sanctions.[21] Also omitted are cases in two other areas where review of mixed questions may be governed by special nationwide rules, but where the existence of those special rules is less clear— negligence[22] and sentencing under the Sentencing Reform Act of 1984.[23]

### A. CIRCUITS USING THE "CLEARLY ERRONEOUS" STANDARD

Only the First and Seventh Circuits consistently employ a "clearly erroneous"[24] standard to review all mixed questions of law and fact. The First Circuit's adherence to a blanket rule of "clearly erroneous" review can be traced back at least as far as its 1979 opinion in *Sweeney v. Board of Trustees*.[25] The *Sweeney* court noted that the First Circuit "has applied the clearly erroneous standard to conclusions involving mixed questions of law and fact except where there is some indication that the court misconceived the legal standards."[26] The proviso at the end of that sentence, of course, reserves the right to plenary review of "pure" questions of law. Since *Sweeney*, First Circuit panels have consistently applied the "clearly erroneous" standard to review of mixed questions irrespective of substantive areas.[27]

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*Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C.L. REV. 993 (1986); Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985). *See also infra* notes 225-275 and accompanying text.

20. *See* Miller v. Fenton, 474 U.S. 104 (1985); Wainright v. Witt, 469 U.S. 412 (1985); Maggio v. Fulford, 462 U.S. 111 (1983); Sumner v. Mata (II), 455 U.S. 591 (1982); Sumner v. Mata, 449 U.S. 539 (1981).

21. *See* Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447 (1990).

22. *See, e.g.*, Bell v. United States, 854 F.2d 881, 887-90 (6th Cir. 1988) (clearly erroneous); Rawl v. United States, 778 F.2d 1009, 1014 n.9 (4th Cir. 1985) (expressing preference for de novo review), *cert. denied*, 479 U.S. 814 (1986); Bonds v. Mortensen & Lange, 717 F.2d 123, 125 (4th Cir. 1983) (clearly erroneous).

23. *See, e.g.*, United States v. Stokley, 881 F.2d 114, 116 (4th Cir. 1989) (appellate review of district court decisions under the Sentencing Reform Act); United States v. Ortiz, 878 F.2d 125, 126-27 (3d Cir. 1989) (same); United States v. Daughtrey, 874 F.2d 213 (4th Cir. 1989) (same).

24. For a sophisticated appreciation of the variability built into the meaning of the phrase "clearly erroneous," see Cooper, *Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645 (1988).

25. 604 F.2d 106 (1st Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980).

26. *Id.* at 109 n.2 (citations omitted).

27. *See, e.g.*, McLaughlin v. Hogar San Jose, Inc., 865 F.2d 12, 14 (1st Cir. 1989) (whether an employer acted in good faith and reasonably for purposes of mandatory liquidated damages provision of the Fair Labor Standards Act); Curley v. Mobil Oil Corp., 860 F.2d 1129, 1132 (1st Cir. 1988) (whether a sales contract was breached because of failure to arrange the closing within reasonable time); Valedon Martinez v. Hospital Presbeteriano de la Comunidad Inc., 806 F.2d 1128, 1132 (1st Cir. 1986) (whether plaintiff was a citizen of Florida at time of the action's commencement); Foggs v. Block, 722 F.2d 933, 938 (1st Cir. 1983) (whether notice to food stamp recipients was

The Seventh Circuit's rule was articulated in *Mucha v. King*.[28] The question was whether the plaintiff had legal possession of a valuable painting at specified times. Judge Posner, speaking for the court, stated that "[f]acts of this sort, which are found by applying a legal standard to a descriptive or historical narrative, are governed by the clearly-erroneous rule."[29] After noting that the Second Circuit has long reviewed mixed questions under a non-deferential standard—citing Judge Friendly's endorsement of searching review in *Mamiye Bros. v. Barber S.S. Lines*[30]—Judge Posner explained why such review should be deferential:

> [T]he main reason for appellate deference to the findings of fact made by the trial court is not the appellate court's lack of access to the materials for decision but that its main responsibility is to maintain the uniformity and coherence of the law, a responsibility not engaged if the only question is the legal significance of a particular and nonrecurring set of historical events. This set will not recur—that is for sure.
>
> Once Rule 52(a) is understood to rest on notions of the proper division of responsibilities between trial and appellate courts, rather than just on considerations of comparative accessibility to the evidence, the concern expressed by Judge Friendly in *Mamiye*—that it is shocking to imagine that two identical cases might be decided in opposite ways by two different district judges, yet each decision be affirmed—subsides. Review is deferential precisely because it is so unlikely that there will be two identical cases; the appellate court's responsibility for maintaining the uniformity of legal doctrine is not triggered.[31]

The nub of Judge Posner's rationale is that if an appellate court is not going to create useful precedent with its decision, then no rationale justifies discarding the district court's work by non-deferential review.

The Seventh Circuit has consistently followed the rule as stated in *Mucha v. King* without regard to the particular type of mixed question.[32]

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constitutionally adequate), *rev'd sub nom.*, Atkins v. Parker, 472 U.S. 115 (1985) (reversed without discussing standard of review).

28. 792 F.2d 602 (7th Cir. 1986).

29. *Id.* at 605.

30. 360 F.2d 774, 776-78 (2d Cir.), *cert. denied*, 385 U.S. 835 (1966).

31. *Mucha*, 792 F.2d at 605-06 (citations omitted).

32. *See, e.g.*, Chicago Truck Drivers Union Pension Fund v. Louis Zahn Drug Co., 890 F.2d 1405 (7th Cir. 1989) (whether transaction constituted "bona fide sale of assets" and was not to "evade or avoid liability" for purposes of Employee Retirement Income Security Act and Multiemployer Pension Plan Amendments Act); Eli Lilly & Co. v. Commissioner, 856 F.2d 855, 860-61 (7th Cir. 1988) (whether Tax Court's reallocation of income and deductions among multiple entities was correct); Standard Office Bldg. Corp. v. United States, 819 F.2d 1371, 1373-74 (7th Cir. 1987)

The only recent case to the contrary is *Schuneman v. United States*,[33] decided three months prior to *Mucha*. In *Schuneman* the panel held that the question of whether rental income was substantially dependent on production, for the purposes of determining the applicability of the qualified use exception to the rule requiring the sale of a family farm under 26 U.S.C. § 2032A(b)(1), was "independently reviewable."[34] The court stated that, "[a]lthough there exists a conflict among the circuits concerning the proper standard of review of mixed questions of law and fact in this circuit such determinations are independently reviewable by an appellate court."[35] This conclusion, however, was apparently based on an incautious reading of an earlier Seventh Circuit case that dealt only with the review of mixed questions in the context of federal habeas review of state court convictions.[36] As noted above, federal habeas review of state court proceedings is governed by a special rule.[37]

### B. Circuits Using the De Novo Standard

Although the case law is not entirely settled, it can be said with some confidence that the Second, Third, Eighth, and District of Columbia Circuits apply a plenary (de novo) standard to review mixed questions of law and fact, usually without regard to the particular area of law involved.

In the Second Circuit the two most enlightening cases are *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.* [38] and *Sobiech v. International Staple & Machine Co.* [39] In *Volkswagenwerk*, the question was whether a corporate defendant was "doing business" in the forum state for purposes of the long-arm personal jurisdiction statute. Judge Winter, speaking for the court, defined the question as an "issue of mixed law and fact to which the presumption created by Rule 52(a) has little if any application."[40] In *Sobiech* the question whether a warranty should be implied into a contract was held to be a "mixed question of law and fact,

(whether particular activities amounted to " 'service . . . in connection with' rail transportation" within the meaning of the Railroad Retirement Tax Act).

33. 783 F.2d 694 (7th Cir. 1986).

34. *Id.* at 698-99.

35. *Id.* (citations omitted).

36. United States *ex rel* Tonaldi v. Elrod, 716 F.2d 431 (7th Cir. 1983).

37. *See supra* note 20 and accompanying text.

38. 751 F.2d 117 (2d Cir. 1984).

39. 867 F.2d 778 (2d Cir. 1989).

40. *Volkswagenwerk*, 751 F.2d at 120 (citing Bose Corp. v. Consumers Union, 466 U.S. 485, 501 (1984)).

involving interpretation of contract terms, which we may review independently."[41] Although the *Sobiech* decision relied on the Seventh Circuit's decision in *Schuneman*, which in turn relied on a federal habeas case,[42] it seems clear that the *Sobiech* court was intent on applying a nondeferential standard of its own accord.

In the Third Circuit, the germinal work on review of mixed questions is Judge Aldisert's scholarly opinion in *Universal Minerals, Inc. v. C.A. Hughes & Co.*[43] Judge Aldisert argues that facts must be divided into three categories—basic, inferred, and ultimate. The definitions follow:

> Basic facts are the historical and narrative events elicited from the evidence presented at trial, admitted by stipulation, or not denied, where required, in responsive pleadings. Inferred factual conclusions are drawn from basic facts and are permitted only when, and to the extent that, logic and human experience indicate a probability that certain consequences can and do follow from the basic facts. No legal precept is implicated in drawing permissible factual inferences. But an inferred fact must be distinguished from a concept described in a term of art as an "ultimate fact." So conceived, an ultimate fact is a mixture of fact and legal precept . . . . An ultimate fact is usually expressed in the language of a standard enunciated by case-law rule or by statute, e.g., an actor's conduct was negligent; the injury occurred in the course of employment; the rate is reasonable; the company has refused to bargain collectively.[44]

Judge Aldisert further states that the review of ultimate facts "entails an examination for legal error of the legal components of those findings."[45] Thus, the *Universal Minerals* decision stands for the proposition that review of a district court's legal conclusion concerning a mixed question is plenary. The case generally continues to be followed in the Third Circuit.[46]

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41. *Sobiech*, 867 F.2d at 782.

42. *See supra* note 20 and accompanying text.

43. 669 F.2d 98 (3d Cir. 1981).

44. *Id.* at 102 (citation omitted) (quoting R. ALDISERT, THE JUDICIAL PROCESS 694 (1976)).

45. *Id.* (quoting Smith v. Harris, 644 F.2d 985, 990 (3d Cir. 1981) (Aldisert, J., concurring)).

46. *Compare In re* Sharon Steel Corp., 871 F.2d 1217, 1222-23 (3d Cir. 1989) (following the plenary review standard for mixed questions enumerated in *Universal Minerals*); Bennerson v. Small, 842 F.2d 710, 713-14 (3d Cir.), *cert. denied*, 488 U.S. 845 (1988) (plenary review of whether person was bona fide purchaser); and Ram Constr. Co., v. American States Ins. Co., 749 F.2d 1049, 1053 (3d Cir. 1984) (contractual interpretation) *with* Protos v. Volkswagen of Am., Inc., 797 F.2d 129, 135 n.3 (3d Cir.), *cert. denied*, 479 U.S. 972 (1986) (applying clearly erroneous review to the question of whether particular religious accommodation would cause employer "undue hardship" for purposes of Title VII).

The Eighth Circuit more clearly adheres to a general de novo standard than does the Second Circuit. In *United States v. Campbell*[47] the question was whether, on the facts established at trial, reasonable suspicion or probable cause justified seizing the defendant. The court held that the "ultimate conclusion" of the seizure's constitutionality *vel non* was reviewable de novo.[48] In *Besta v. Beneficial Loan Co.*[49] the question was whether a loan contract was unconscionable under state law. The court held that it was free to engage in "plenary review of the legal conclusion" arrived at by the district court's application of law to facts.[50] And in *Hill v. Blackwell*,[51] where the question was whether a prison regulation prohibiting beards violated a prisoner's right to free exercise of religion under the first amendment, the court similarly held that "review of the ultimate legal conclusion is plenary."[52]

The District of Columbia Circuit also consistently adheres to a general de novo standard. In *Carter v. Bennett*[53] the court unhesitatingly held that de novo review applied to the mixed question of whether an employer's accommodation was "reasonable" within the meaning of the Rehabilitation Act of 1973.[54] In *Blitz v. Donovan*[55] the court employed the de novo standard to review the question of whether the government's litigating position was "substantially justified" for purposes of the Equal Access to Justice Act.[56] Finally, in *United States v. Yunis*[57] the court stated that the de novo standard must be used to review the question of whether the defendant waived his or her fifth and sixth amendment rights "voluntarily, knowingly, and intelligently."[58] The only exception to the general de novo rule in the District of Columbia Circuit appears to be that the "clearly erroneous" standard governs review of a district court's findings in a criminal case insofar as they do not touch upon the question of guilt.[59]

47. 843 F.2d 1089 (8th Cir. 1988).
48. *Id.* at 1092.
49. 855 F.2d 532 (8th Cir. 1988).
50. *Id.* at 533.
51. 774 F.2d 338 (8th Cir. 1985).
52. *Id.* at 343.
53. 840 F.2d 63 (D.C. Cir. 1988).
54. *Id.* at 64-65.
55. 740 F.2d 1241 (D.C. Cir. 1984).
56. *Id.* at 1244.
57. 859 F.2d 953 (D.C. Cir. 1988).
58. *Id.* at 958.
59. *See* United States v. Meyer, 810 F.2d 1242, 1244 (D.C. Cir.), *vacated*, 816 F.2d 695 (en banc), *reinstated sub nom.*, Bartlett *ex rel.* Newman v. Bowen, 824 F.2d 1240 (en banc) (1987). The district court had dismissed the prosecution for vindictiveness. The appellate panel stated that "[t]he clearly erroneous standard ordinarily governs review of a judge's findings in a criminal case on issues

### C. CIRCUITS USING THE VARIABLE STANDARD

The Ninth and Tenth Circuits purport to use a standard that varies from case to case, no matter what the substantive area. The Ninth Circuit first adopted this position in *United States v. McConney*,[60] in which the government claimed it was excused, due to exigent circumstances, from satisfying the federal "knock-notice" statute prior to entering the defendant's home.[61] The court, overruling an older Ninth Circuit precedent, held that this mixed question should be reviewed de novo.[62]

In so holding, the court discussed at length what it called "standard of review jurisprudence."[63] The court opined that standards of review ought to turn on "concerns of judicial administration—efficiency, accuracy, and precedential weight."[64] If a particular mixed question requires an inquiry that is "essentially factual," then those concerns will favor vesting primary responsibility for the decision with the trial court and "clearly erroneous" review will apply. If the question requires the appellate court to "exercise judgment about the values that animate legal principles," however, the concerns of judicial administration will favor giving the responsibility to the appellate court and de novo review will apply.[65] The court noted that this rule would produce de novo review of most mixed questions, but also that "clearly erroneous" review should continue to apply in two types of cases: those in which the applicable legal standard provides for a strictly factual test and negligence cases.[66] The court conceded that its test was "not a precise one" and did not offer a "litmus test by which all mixed questions can be neatly categorized."[67] Although the court may have doubted the precision of its analysis, at least it recognized the primacy of allocational concerns in prescribing standards of review.

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other than the defendant's guilt . . . [even] when they involve mixed questions of law and fact." *Meyer*, 810 F.2d at 1244. However, this exception to general de novo review appears not to have gained currency in other circuits generally employing de novo review of mixed questions.

60. 728 F.2d 1195 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984).

61. The "knock-notice" statute is 18 U.S.C. § 3109 (1982).

62. United States v. Flickinger, 573 F.2d 1349, 1359 (9th Cir.), *cert. denied*, 439 U.S. 836 (1978).

63. *McConney*, 728 F.2d at 1204.

64. *Id.* at 1202.

65. *Id.*

66. *Id.* at 1204.

67. *Id.*

Other circuits have cited *McConney* with approval and employed its test to assign standards of review to the mixed questions before them.[68] The only other circuit adhering to *McConney* with any regularity, however, is the Tenth Circuit. In *Supre v. Ricketts*[69] the question was whether a party had "prevailed" for purposes of an attorney's fee award. Explicitly relying on *McConney*, the court held this to be a mixed question dominated by legal factors and therefore subject to de novo review. Two more recent cases in the Tenth Circuit, despite reviewing the mixed questions before them under the "clearly erroneous" standard, purport to rely on *Supre* or *McConney*.[70]

### D. Circuits Following No Discernable Pattern

The muddiest waters lie in the Fourth Circuit. Two recent Fourth Circuit cases plainly adopt the Ninth Circuit's approach of *McConney* in the limited context of reviewing sentences under the Sentencing Reform Act of 1984.[71] But the standard of review for other cases of mixed questions remains unclear. There are apparently conflicting cases on the applicable standard for reviewing negligence decisions,[72] and another case suggests that de novo review should be applied to findings of jurisdictional facts.[73]

In the Fifth Circuit several classes of mixed questions have been held subject to plenary review. For example, it is clear that appellate review of the prerequisites for the grant of extraordinary relief presents

68. *See, e.g.*, United States v. Ortiz, 878 F.2d 125, 126-27 (3d Cir. 1989); United States v. Daughtrey, 874 F.2d 213, 217-18 (4th Cir. 1989).

69. 792 F.2d 958, 961-62 (10th Cir. 1986).

70. *See* Bill's Coal Co. v. Board of Pub. Util., 887 F.2d 242, 245 (10th Cir. 1989) (whether a party to a contract was a "lost volume seller" within the meaning of the Uniform Commercial Code); Love Box Co. v. Commissioner, 842 F.2d 1213, 1215 (10th Cir.), *cert. denied*, 488 U.S. 820 (1988) (whether a proximate relationship existed between seminars and employees' job skills for purposes of deductibility).

71. United States v. Stokley, 881 F.2d 114, 116 (4th Cir. 1989) ("On mixed questions of fact and law, there is no bright-line standard but rather a sliding scale depending on the 'mix' of the mixed question."); *Daughtrey*, 874 F.2d at 218 (citing United States v. McConney, 728 F.2d 1195 (1984)).

72. *Compare* Bonds v. Mortensen & Lange, 717 F.2d 123, 125 (4th Cir. 1983) (squarely holding that the "clearly erroneous" standard applies to review of negligence determinations and overruling Hicks v. United States, 368 F.2d 626, 631 (4th Cir. 1966)) *with* Rawl v. United States, 778 F.2d 1009, 1014 n.9 (4th Cir. 1985) (whether plaintiff was contributorily negligent) (expressing preference for de novo review in dicta), *cert. denied*, 479 U.S. 814 (1986).

73. Goldfarb v. Virginia State Bar, 497 F.2d 1, 16 (4th Cir. 1974) (de novo review of whether defendant's activities had a "direct and substantial" effect on interstate commerce for purposes of subject matter jurisdiction under the Sherman Act), *rev'd*, 421 U.S. 773 (1975).

mixed questions of law and fact governed by the de novo standard.[74] The mixed question of whether given persons are "employees" within the meaning of the Fair Labor Standards Act is also reviewable under the de novo standard.[75] In a criminal procedure decision, the mixed question of whether police officers' reliance on a search warrant was "objectively reasonable"[76] is open to de novo review. However, not all mixed questions in the Fifth Circuit are reviewed under the de novo standard. One Fifth Circuit panel has held that the question whether a person was a "seaman" for purposes of the Jones Act is reviewable under the "clearly erroneous" standard.[77] Another Fifth Circuit panel has held that the question of whether an individual acted as a corporation's agent was to be reviewed under the "clearly erroneous" standard.[78] Although there is language in the latter case—reminiscent of the Ninth Circuit's position—suggesting that the standard of review varies with the "mix" of the particular question involved, other Fifth Circuit opinions do not adopt the variable standard.

The Sixth Circuit has considered the general standard of review of mixed questions only once at any length, in *K & M Joint Venture v. Smith International, Inc.*[79] The question was whether notice of a claimed breach of warranty was given within a reasonable time under the Uniform Commercial Code. After characterizing this as a question of law, constituting the "law" portion of a mixed question of law and fact, the court stated that "in reviewing mixed findings we are not bound by the clearly erroneous standard" and proceeded to apply a de novo standard.[80] From the majority opinion it is not clear whether the court meant that mixed questions must always be broken down into legal and factual components and reviewed accordingly, or whether mixed questions should simply be reviewed de novo as a whole. The dissent, however, suggests that the court meant the latter.[81]

74. *See* Byrne v. Roemer, 847 F.2d 1130, 1133 (5th Cir. 1988); Hay v. Waldron, 834 F.2d 481, 484-85 (5th Cir. 1987).

75. *See* Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042, 1045 (5th Cir.), *cert. denied*, 484 U.S. 924 (1987); Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1327 n.24 (5th Cir. 1985); Castillo v. Givens, 704 F.2d 181, 185-187 (5th Cir.), *cert denied*, 464 U.S. 850 (1983). *But see* Donovan v. Sabine Irrigation Co., 695 F.2d 190, 194 (5th Cir. 1983).

76. Within the meaning of United States v. Leon, 468 U.S. 1250 (1984).

77. Legros v. Panther Servs. Group, Inc., 863 F.2d 345, 351 (5th Cir. 1988).

78. American Int'l Trading Corp. v. Petroleos Mexicanos, 835 F.2d 536, 539 (5th Cir. 1987).

79. 669 F.2d 1106 (6th Cir. 1982).

80. *Id.* at 1111-12.

81. *Id.* at 1116-18 (Holschuh, J., concurring in part and dissenting in part).

Dictum in *Clevenger v. Oak Ridge School Board*[82] is consistent with the latter interpretation of *K & M Joint Venture*, but the opinion in *Wynn Oil Co. v. Thomas*[83] seems to adopt the former statement of the rule. The question in *Wynn Oil* was whether the defendant's conduct had created a likelihood of confusion for trademark infringement purposes. The court stated that the "foundational facts" were to be reviewed under a deferential standard, but that it would "review *de novo* the legal question whether, given the foundational facts as found by the lower court, those facts constitute a 'likelihood of confusion'."[84]

The Eleventh Circuit appears never to have squarely faced the question of what standard applies to review of mixed questions. One recent case offhandedly states that review of mixed questions is accorded the "clearly erroneous" standard,[85] but a dictum from another recent case states that the product of a district court's application of law to fact is subject to "more rigorous review."[86] A third, somewhat older, case states that "clearly erroneous" review applies to ultimate facts, but this case appears to be based on shaky precedent.[87]

## III. THE PROPER ROLE OF APPELLATE COURTS

### A. SHOULD APPELLATE COURTS ATTEMPT TO "DO JUSTICE" AS BETWEEN LITIGANTS AT BAR?

The crux of Judge Posner's *Mucha v. King*[88] rationale in favor of "clearly erroneous" review of mixed questions is revealed in one statement: "Review is deferential precisely because it is so unlikely that there will be two identical cases; the appellate court's responsibility for maintaining the uniformity of legal doctrine is not triggered."[89] There is, of course, nothing remarkable about a statement that appellate courts are

82. Discussed at length *infra* notes 277-91 and accompanying text.

83. 839 F.2d 1183 (6th Cir. 1988).

84. *Id.* at 1186.

85. United States v. Malekzadeh, 855 F.2d 1492, 1496 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 1163 (1989). It is not clear to which questions the court was alluding when it stated that review of mixed questions is under the "clearly erroncous" standard. The allusion appears to be to the question of whether certain wiretaps complied with a court order.

86. Hawkins v. Ceco Corp., 883 F.2d 977, 981 n.4 (11th Cir. 1989) ("[T]here is substantial authority for the view that legal inferences from facts or an application of the law to the facts invites a more rigorous review."), *cert. denied*, 110 S. Ct. 2180 (1990).

87. Matthews v. United States, 713 F.2d 677, 681 (11th Cir. 1983) (whether to imply restrictive covenant) (citing ACLU v. Rabun County Chamber of Commerce, 698 F.2d 1098, 1110 (11th Cir. 1983)). The latter case, in turn, seems to rely on the extremely dubious theory that Pullman-Standard v. Swint, 456 U.S. 273 (1982), requires "clearly erroneous" review of all ultimate facts.

88. 792 F.2d 602 (7th Cir. 1986).

89. *Id.* at 606.

responsible for maintaining doctrinal uniformity. Clearly this is a goal of appellate review: trial courts are inherently unable to maintain the necessary perspective and inter-court coordination to achieve such uniformity in their rulings. But when Judge Posner endorses deferential review except when ruling otherwise is necessary to maintain doctrinal uniformity, he makes a considerably bolder and more profound declaration about the proper role of appellate courts. He assumes that the *only* legitimate function of appellate courts is to oversee the development of doctrine and that appellate courts are not directly concerned with ensuring that the correct result is reached as between the litigants at bar. For if it were the appellate court's responsibility to ensure that the district court not only applied the correct rule, but also reached the right result in each case, then the mere absence of concerns about doctrinal uniformity would not compel deferential review. Instead, the appellate court would exercise whatever review was necessary to reach the correct result.

Professor Wright and Dean Carrington have debated whether appellate courts have the power and responsibility to exercise whatever review is necessary to ensure correct results. In his aptly titled article, *The Doubtful Omniscience of Appellate Courts*,[90] Professor Wright—taking a cue from observations made earlier by Dean Leon Green[91]—deplored what Green saw as a creeping usurpation of trial court prerogatives by appellate courts. Wright observed that appellate courts more liberally reviewed the size of verdicts, were more willing to set aside verdicts as being against the weight of the evidence, used de novo review over findings of fact based on documentary evidence,[92] and more often used extraordinary writs to overturn discretionary trial court decisions.[93] "[T]he centralization of legal power in the appellate courts, which Dean Green detected more than a quarter century ago, proceeds at an accelerating pace,"[94] Wright warned.

In Wright's view, the appellate courts' growing annexation of trial court prerogatives was an unwelcome development. Certainly the judicial system should facilitate justice, and appellate courts should ensure that justice is done in the broad range of cases. But is it wise for appellate courts to take upon themselves the additional responsibility of seeing that justice is done in particular cases? Wright thought not:

90. Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957).

91. L. GREEN, JUDGE AND JURY 392-94 (1930).

92. On this, Professor Wright's view has been vindicated. *See* FED. R. CIV. P. 52 (advisory committee note to 1985 amendment).

93. Wright, *supra* note 90, at 751.

94. *Id.* at 778.

> It is hard to believe that there has been any great public dissatisfaction with the restricted appellate review which was traditional in this country. Very early in our history Chief Justice Ellsworth observed: 'But, surely, it cannot be deemed a denial of justice, that a man shall not be permitted to try his case two or three times over.' . . . I doubt whether there will be much satisfaction with the judgments of trial courts among a public which is educated to believe that only appellate judges are trustworthy ministers of justice.[95]

Carrington did not deny the trend toward expanded appellate powers, but generally defended it as a welcome development. "I view the various trends adverted to [by Wright] as aspects of a single development of a tighter institutional framework to bind or channel the power of trial judges,"[96] he wrote. This development in favor of "appellate activism" was to be regarded as benign, he continued, so long as one subscribed to the beliefs that "three heads are better than one" and that appellate review permits more reflection than is possible at the trial court level.[97]

It is safe to say that Judge Posner's decision in *Mucha v. King* essentially embraces Professor Wright's view of the proper role of appellate courts and rejects Dean Carrington's view. Like Professor Wright, Judge Posner is dedicated to the idea that appellate courts must do their brand of justice by developing rules capable of general application. Trial courts must primarily be entrusted to implement these rules on a case-by-case basis. Unlike Professor Wright, however, Judge Posner makes no attempt to explain *why* the proper role of appellate courts is restricted to the development of doctrine. He simply assumes that this restricted function is proper, which is somewhat curious, since the very existence of the Wright-Carrington debate indicates that the assumption is not uncontroversial.

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95. *Id.* at 780-81 (quoting Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 329 (1796)). *Cf.* Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541, 542 (1989) (The original role of the intermediate appellate courts was to review for error, but "geometric increases in caseload and the vast expansion in the scope of federal law have made that model obsolete." Presumably, the current primary role of such courts is to maintain intracircuit consistency.).

96. Carrington, *The Power of District Judges and the Responsibility of Courts of Appeals*, 3 GA. L. REV. 507, 527 (1969).

97. *Id.*

## B. Possible Theories Supporting a Restricted View of the Appellate Function

### 1. *Efficiency*

One can speculate why the *Mucha v. King* panel believed appellate courts generally should not attempt to "do justice" between the individual litigants by exercising plenary review over applications of law to fact. Perhaps, pursuant to some sort of efficiency analysis, it made certain empirical suppositions about the respective courts' ability to maximize utility and about the costs of plenary review. Whether appellate panels engaging in plenary review of application of law to fact reach results generating greater net satisfaction on the part of litigants and society is, of course, an empirical question. Dean Carrington assumed an affirmative answer ("[T]hree heads are better than one.").[98] Professor Wright disagreed, based on his impression that appellate judges as a group are no wiser than trial judges.[99] He also thought that freer appellate review with an eye toward ensuring "just" results in each case would encourage appeals, entail higher costs for litigants and the judicial system, and perhaps exacerbate societal discontent with the slowness of the judicial process. It is possible that the *Mucha v. King* court, working within this type of analytical framework, simply preferred Wright's empirical guesses to Carrington's.

Moreover, developing uniform, principled doctrine is a more efficient use of a scarce resource (i.e., appellate court time) than is attempting to ensure just results in individual cases.[100] One would expect that as legal doctrine becomes more uniform and thus more certain, courts and litigants will expend fewer resources preparing and conducting trials. Uncertainty about underlying legal doctrine prompts cautious trial judges to set hearings that would not otherwise be set, to ask for briefs that would not otherwise be written, to take motions under advisement that they would otherwise dispose of from the bench. Moreover, increased doctrinal certainty would conceivably reduce commercial transaction costs and permit marginally wealth-increasing transactions to

98. *See id.*

99. *See* Wright, *supra* note 90, at 781.

100. This is all the more true in light of the rule that district court opinions are not binding on other district courts, even in the same district. *See* United States v. Articles of Drug Consisting of 203 Paper Bags, 818 F.2d 569, 572 (7th Cir. 1987); Starbuck v. City & County of San Francisco, 556 F.2d 450, 457 n.13 (9th Cir. 1977); State Farm Mut. Auto. Ins. Co. v. Bates, 542 F. Supp. 807, 816 (N.D. Ga. 1982). *But see In re* McKee, 416 F. Supp. 652, 654-55 (E.D. Ark. 1976) (In absence of authoritative higher court ruling, a federal district court should ordinarily follow decisions of other federal district courts within the same state.).

take place where they otherwise would not. Transactional lawyers, of course, do their work against the prospect of future litigation. To the degree that it becomes more difficult to predict what future courts might do, these lawyers must spend more time researching the law and drafting clauses that will allow their clients to protect themselves against the uncertainty. Because transaction costs are high, some transactions are no longer worth engaging in, despite the fact that they would otherwise benefit both parties. Lowering these transaction costs by clarifying doctrine would permit rational parties to engage in such transactions.

It is quite difficult to evaluate either of these theories in the absence of hard empirical data. We do not know whether appellate courts that apply fact to law during plenary review reach results that produce greater net satisfaction among litigants and society than do results reached by trial courts. Appellate judges certainly have the advantage of group deliberations and group voting, which might produce better results in some cases, but which might produce unsatisfying compromises in others. Appellate judges also have the luxury of distanced reflection, which might undo the ill effects of trial court impetuosity in some cases, but which might also undo the benefits of the trial judge's having lived with the case over a sustained period. It is also unclear whether freer appellate review encourages higher appeal rates. It is plausible that plenary appellate review would produce a higher reversal rate than deferential appellate review, which might in turn cause the losing party at trial to appeal at a higher rate; but it might just as well merely cause the prevailing party to offer the losing party slightly more favorable post-judgment settlement terms, while leaving the rate of actual appeals substantially unchanged. Such "armchair empiricism,"[101] however, is of limited assistance in the context of this sort of efficiency analysis.

Nor does it seem possible, without hard empirical evidence, to undertake a meaningful analysis of the theory that developing uniform doctrine is the most efficient use of appellate time. At what point would clearer doctrine begin to yield lower expenditures of judicial and litigant resources? Is there any correlation between the amount of time an appellate court spends developing doctrine and the resulting degree of clarity? Is there any correlation between the amount of time an appellate court spends reviewing mixed questions of law and fact and the "justness" of the result? This is to say nothing of the difficulty of devising a single

101. *See* Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REF. 647, 691-92 (1988) (cautious endorsement of scholarship relying upon impressionistic observations about behavior when tied to theoretical framework).

philosophical metric by which to measure the value of achieving just results in individual cases against the value of conserving scarce resources and maximizing societal wealth.

2. *Credibility and Prestige*

Another theory that supports the idea that appellate courts should restrict themselves to developing generally applicable rules concerns the credibility and prestige of appellate courts and appellate power.[102] This theory begins with the premise that governmental power is illegitimate unless it is constrained in some manner.[103] In some instances the constraint is external, that is, one governmental actor has been empowered to nullify or modulate another's conduct. For example, the availability of executive veto and judicial review generally legitimates Congress's power to legislate. In other circumstances, the constraint is internal because, although no other governmental actor can nullify the act, the decision maker is obligated to decide in a rational (i.e., nonarbitrary) manner.[104] While internal constraints can help legitimate a decision maker's acts, they are less likely to provide a constraining force than external constraints.

The power of a federal district court is usually externally constrained.[105] The court of appeals or the Supreme Court can reverse its rulings, and all final judgments in the district courts (and some that are not final) are appealable as a matter of right.[106] Thus, while district courts are certainly under an internal obligation to decide in a rational way, external constraints are usually sufficient to legitimate the exercise of a district court's power.

The legitimation of appellate courts' power is more problematical. Since their decisions are not appealable to the Supreme Court as a matter

102. I use the terms credibility and prestige to steer the discussion away from true political legitimacy, which is a matter for political philosophy. By credibility and prestige I simply mean "reputation" as it affects a judge's or court's future ability to persuade lawyers, litigants, and the general public with regard to uncertain propositions. *Cf.* Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 528-30 (1986) (describing the phenomenon of judicial "mana" or "charisma").

103. *See* Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 642 (1982).

104. *Id.* at 643 n.29.

105. Fletcher points to one seeming anomaly: Under the removal statutes, 28 U.S.C. §§ 1447(c)-(d), a federal court order remanding a case to state court is not reviewable. *Id.* at 642 n.28. Fletcher also points out that notwithstanding the terms of the statute, a remand is reviewable on mandamus if the remand was based on erroneous grounds.

106. *See* 28 U.S.C. §§ 1253, 1291 (1988). There are a number of exceptions to the final judgment rule. *See* C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE, §§ 3905-3919.

of right,[107] appellate courts' external constraints are quite weak. Besides a handful of cases involving extremely important legal issues or notorious litigants, the remote possibility of higher review probably will not serve to constrain the intermediate appellate court's decision-making process.

As a result, we search for some form of internal constraint. One form of internal constraint is the general obligation of judges to conform their decisions to authoritative texts—the Constitution, duly-enacted statutes, other appellate opinions, treaties, executive orders, and regulations. Judges typically do not feel free to rule on matters in ways that clearly contradict such authoritative texts because they realize that their credibility and prestige depend largely upon the perception that they *do* decide cases in conformity with authoritative texts.[108]

Though I would classify this constraint as a strong one, it is sporadically distributed, not unlike the few teeth left in an old comb. What teeth remain are still capable of doing their work, but in some sense, the overall effect is negligible. Similarly, where an authoritative text clearly preordains the decision of a legal issue, that text does constitute an almost insuperable barrier to a contrary resolution of the issue. But "cases" are usually composed of many issues, several of which might ultimately control the disposition. As a result, the court's choice among the jurisdictionally permissible options (affirm, modify, vacate, set aside, or reverse)[109] appears relatively unconstrained as long as there exists *any* issue in the case whose resolution is not precisely dictated by an authoritative text.[110] This point represents nothing more than the well-established observation that rules sometimes "run out,"[111] applied to the disposition of cases as a whole rather than to individual issues. To state

107. Prior to 1988 there were two avenues of appeal to the United States Supreme Court as a matter of right from decisions of federal courts of appeals. *See* 28 U.S.C. § 1252 (appeal from any federal court decision holding an Act of Congress unconstitutional in a civil action); § 1254(2) (appeal from decision of court of appeals finding a state statute repugnant to federal constitution, statute, or treaty). Both were repealed in 1988. *See* 102 Stat. 662 (1988).

108. *See* Kennedy, *supra* note 102, at 529.

109. 28 U.S.C. § 2106 (1988).

110. It is certainly true that judges feel a need to fit their decisions into the general topography created by prior decisions in the area. By constraint, however, I refer to situations in which judges feel impelled to decide against their best judgment simply because of the existence of a prior decision. *Cf.* Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 4 (1989) ("[T]he power of precedents to *support* decisions a court believes are otherwise justifiable depends upon the power of precedents to *constrain* a court from reaching decisions it believes are justifiable.").

111. J. FINCH, INTRODUCTION TO LEGAL THEORY 136-44 (3d ed. 1979) (describing Dworkin's criticism of H.L.A. Hart's analysis of what happens when applicable rules are inadequate to dictate a result). Hart attributed the phenomenon of rules running out to the "open texture of law." In the face of such indeterminacy, judges were left to discretion. *See* H.L.A. HART, THE CONCEPT OF

this is not to reject Dworkin's rights thesis—the idea that cases are decided on the basis of preexisting rights—or to reject any theory of adjudication premised on this thesis (e.g., that the task of judges is to search for the right or true answer).[112] However, it is often difficult to assess whether an answer is right or true within the meaning of the relevant sources of law.[113] The situation is not helped by the ascendancy of so many open-textured rules from constitutional, statutory, and common-law sources and the increasing preference for multi-factor balancing tests to decide claims. As students of philosophy, we know that the ultimate legitimacy of judicial power depends on whether it is exercised to right ends, but at the same time, *as lawyers*, we cannot very often demonstrate to the satisfaction of laypeople why a close case was decided correctly and pursuant to preexisting rules or principles.[114] Visible constraints on the judicial decision-making process, as second-best substitutes for hard proof of correctness in results, enhance the credibility and moral force of judicial pronouncements.[115] Hence my belief in the importance of constraints on decision making and in the relative weakness of the obligation to decide consistently with authoritative texts as one such constraint.

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LAW ch. VII (1961). Dworkin attacked this view insofar as it failed to recognize the role of "principles, policies, and other sorts of standards" to decide cases where rules had run out. *See* Dworkin, *Is Law a System of Rules?*, in ESSAYS IN LEGAL PHILOSOPHY 25, 34-41 (R. Summers ed. 1968).

112. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY ch. 4 (1977); Fiss, *Foreward: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

113. *Cf.* Wechsler, *supra* note 12, at 11:

> You may remind me that, as someone in the ancient world observed—perhaps it was Josephus—history has little tolerance for any of those reasonable judgments that have turned out to be wrong. But history, in this sense, is inscrutable, concealing all its verdicts in the bosom of the future; it is never a contemporary critic.

This difficulty is further aggravated by the difficulty in ascertaining what Professor Fiss has called the "disciplining rules"—i.e., the rules governing how much interpretive weight should be assigned any particular source (e.g., text, history, intent). *See* Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 744 (1982) ("[T]he disciplining rules may vary from text to text."). One can rationally believe in the existence of such objective standards for determining the correctness *vel non* of judicial interpretations while at the same time doubt their accessibility to laypersons, or even to many lawyers, judges, and scholars.

114. *Cf.* R. WARREN, ALL THE KING'S MEN 136 (Bantam ed. 1971): "I know some law .... It's like a single-bed blanket on a double bed and three folks in the bed and a cold night. There ain't ever enough blanket to cover the case, no matter how much pulling and hauling, and somebody is always going to nigh catch pneumonia."

115. Thus, my "real-world" analysis does not depend on whether Hart or Dworkin is correct about what happens when rules "run out"—whether, as Hart argued, judges are then left with discretion; or whether, as Dworkin argued, they are obligated to decide on the basis of preexisting principles. For purposes of my analysis, all that matters is that it is often difficult to explain why a case had to be decided the way it was.

### 3. *Principled Decision Making and Deference as Constraints*

The weakness of authoritative texts as a constraining force turns us toward some other form of constraint. "Principled" decision making[116] or an obligation to accord deference to another decision maker provides an additional constraint to appellate decision making. In the context of appellate review, principled decision making means that the appellate court must dispose of the case (affirm, reverse, modify, vacate) in a way that can be explained by reference to a generally applicable rule. This definition essentially parallels what Dworkin has described as a doctrine of "articulate consistency," which "condemns the practice of making decisions that seem right in isolation, but cannot be brought within some comprehensive theory of general principles and policies that is consistent with other decisions also thought right."[117] The last clause ("other decisions also thought right") may seem to suggest a justificatory inquiry that is backward-looking—one that asks whether we can justify the present decision on the basis of past decisions. Whether or not this is what Dworkin means, I want to make it clear that my notion of principled decision making does not depend on a retrospective justification. Rather, the critical prerequisite to principled decision making is that the court decide in a way that it believes will provide a meaningful precedential constraint on *future* courts.[118] For it is the knowledge that its decision will bind future courts that forces the court to decide responsibly[119] and therefore constitutes the kind of constraint on the court that can legitimate its decision.

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116. *See* Wechsler, *supra* note 12, at 17 ("At all events, is not the relative compulsion of the language of the Constitution, of history and precedent—where they do not combine to make an answer clear—itself a matter to be judged, so far as possible, by neutral principles—by standards that transcend the case at hand?").

117. R. DWORKIN, *supra* note 112, at 87-88.

118. Here I assume a system of stare decisis roughly equivalent to the true version of what Professor Alexander has called "the rule model of precedent." *See* Alexander, *supra* note 110, at 17-19.

119. *See* Schauer, *Precedent*, 39 STAN. L. REV. 571, 588-89 (1987). Professor Schauer explains how precedent constrains even a decision maker with a purely forward-looking view:

> [O]f course the current decisionmaker of today is the previous decisionmaker of tomorrow. Although it may seem counterintuitive, this fact causes the current decisionmaker to be constrained by precedent even if there has been no prior decision.
>
> Even without an existing precedent, the conscientious decisionmaker must recognize that future conscientious decisionmakers will treat her decision as precedent, a realization that will constrain the range of possible decisions about the case at hand. If the future must treat what we do now as presumptively binding, then our current decision must judge not only what is best for now, but also how the current decision will affect the decision of other and future assimilable cases. Thus, the current decisionmaker must also take into account what would be best for some different but assimilable events yet to occur. The decisionmaker must then decide on the basis of what is best for *all* of the cases falling within the appropriate category of assimilation.

I have now adumbrated three theories that might support the core idea of Judge Posner's opinion in *Mucha v. King*—that the proper role of appellate courts is limited to developing rules of general applicability ("principled" decision). The efficiency theories rest on empirical suppositions that appear to be partly plausible and partly implausible; as a result, it is difficult to assess their value. The credibility/prestige theory admittedly rests on a rather intellectually deflated measure of political justification;[120] thus, any endorsement of it can only be provisional. In the limited context of resolving the mixed questions conflict, however, the scholarly endorsement of these theories is not essential because, as explained below, the core idea of *Mucha v. King* already underlies two distinct lines of Supreme Court decisions. I now turn to an examination of those cases.

## IV. CASE LAW SUPPORTING THE RESTRICTED VIEW OF THE APPELLATE ROLE

### A. THE APPELLATE FACT-FINDING CASES OF THE 1980S

Two appellate fact-finding cases decided in the 1980s are *Pullman-Standard v. Swint*[121] and *Icicle Seafoods v. Worthington*.[122] In each of these cases, the Supreme Court held that it was improper for the federal court of appeals to supply findings of fact that the district court had failed to make because it held a mistaken view of the law. This section shows how the notion that the proper role of appellate courts is restricted to principled decision making animates both of these decisions.

#### 1. Pullman-Standard v. Swint

In *Pullman-Standard* liability turned on whether the United Steelworkers of America (USW) Local 1466 had violated § 703(h) of Title VII by participating in the establishment of a seniority system with the intent to discriminate against black employees.[123] The district court had held that the motives of another union, the International Association of Machinists and Aerospace Workers (IAM), were irrelevant to the issue

120. *See supra* note 102. *But cf.* Resnik, *Tiers*, 57 S. CAL. L. REV. 837 (1984) (sophisticated theory about interplay of court hierarchy and procedural values that nonetheless takes no position on Rawls's rights thesis). *See also* Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 251 (1990) (discussing Resnik).

121. 456 U.S. 273 (1982).

122. 475 U.S. 709 (1986).

123. The employer, Pullman-Standard, was also alleged to have violated Title VII, 456 U.S. at 275. However, the Supreme Court's opinion dealt only with the possible liability of the USW.

of whether the USW had violated § 703(h) of Title VII.[124] The Fifth Circuit held the district court's ruling to be in error and, after taking IAM's motives into account, proceeded to find that the USW had acted with impermissible discriminatory intent when establishing the seniority system.[125] The court of appeals made its own determination that the unions had established the seniority system with discriminatory intent and therefore that the system's validity should be tested by the "disparate impact" mode of analysis.[126]

The Supreme Court reversed, holding that the court of appeals erred when it made its own factual findings. The majority dwelled on the issue at some length:

> When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings[.] 'Fact finding is the basic responsibility of district courts, rather than appellate courts, and . . . the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court.' . . . All of this is elementary. Yet the Court of Appeals, after holding that the District Court had failed to consider relevant evidence . . . failed to remand for further proceedings as to the intent of [one union] and the significance, if any, of such a finding with respect to the intent of [the other union]. . . .
>
> Proceeding in this manner seems to us incredible unless the Court of Appeals construed its own well-established Circuit rule [as permitting independent findings in this situation]. As we have previously said, however, the premise for this conclusion is infirm . . . .[127]

As Justice Marshall pointed out in his dissent, the Fifth Circuit's finding of discriminatory intent was obviously correct.[128] The record contained ample evidence of intentional discrimination;[129] in Justice

124. *Id.* at 283 n.13.

125. The majority upheld the Fifth Circuit's holding that the district court erred in finding IAM's intent irrelevant to a USW violation of § 703(h). However, the majority also held that IAM's racial motivations could not be "imputed" to USW, as the Fifth Circuit had stated. Such discriminatory intent was relevant insofar as it "shed some light on the purpose of USW or [the employer] in creating and maintaining the separate seniority system at issue . . . ." *Id.* at 292 n.23.

126. *Id.* at 282-85.

127. *Id.* at 291-93 (citations omitted).

128. *Id.* at 303 n.9 (Marshall, J., dissenting) (" 'It is crystal clear that considerations of race permeated the negotiation and the adoption of the seniority system in 1941 and subsequent negotiations thereafter.' ") (quoting Swint v. Pullman-Standard, 624 F.2d 525, 532 (5th Cir. 1980)).

129. The record evidence indicates that a significant number of one-race departments were established upon unionization at Pullman-Standard, and during the next twenty five years,

Marshall's view, it would admit of no other reasonable interpretation.[130] Justice White's opinion for the Court never directly contested Justice Marshall's assertions that the Fifth Circuit's fact finding was correct.[131] Instead, the majority appeared to rely entirely on the notion that the court of appeals would overstep its proper role if it supplied the missing finding needed to establish discriminatory intent.[132]

The lesson that can be drawn from *Pullman-Standard* is that the federal appellate power is restricted to certain outlets. Although the opinion only adumbrates the contours of those outlets, it is certainly fair to say that the majority clearly envisioned the proper roles of appellate courts and trial courts vis-à-vis findings of fact. Any findings essential to the disposition of the case must be made in the first instanee by the district courts.[133] An appellate court may then accept the findings or set them aside as clearly erroneous.[134] If an appellate court's reversal of a district court's legal ruling requires additional findings of fact in order to dispose of the case, then the matter must be remanded to the district court to make such findings.[135]

### 2. Icicle Seafoods v. Worthington

Four years later in *Icicle Seafoods v. Worthington* [136] the Court reiterated the "usual rule"[137] that the court of appeals should remand for the district court to make findings of fact.[138] In *Icicle Seafoods* plaintiffs sued to recover overtime benefits under the Fair Labor Standards Act,

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one-race departments were carved out of previously mixed departments. The establishment and maintenance of the segregated departments appear to be based on *no other considerations than the objective to separate the races.*

*Id.* at 303 n.8 (quoting *Swint*, 624 F.2d at 531).

130. *Id.* at 301.

131. The majority appears ambivalent about a finding of discriminatory intent being the only reasonable interpretation of the record. At one point, it declares that "[t]he mistake of the District Court was that on the record there could be no doubt about the existence of a discriminatory purpose." *Id.* at 291. Yet shortly thereafter, in the process of reversing the Fifth Circuit's finding of discriminatory intent, the Court states that "a remand is the proper course *unless the record permits only one resolution of the factual issue.*" *Id.* at 292 (emphasis added) (citation omitted).

132. "It follows that when a district court's finding on such an ultimate fact is set aside for an error of law, the court of appeals is not relieved of the usual requirement of remanding for further proceedings to the tribunal charged with the task of fact finding in the first instance." *Id.* at 293. The Court did not elaborate on the words "in the first instance."

133. *Id.* at 291-92 & n.22 (citing DeMarco v. United States, 415 U.S. 449, 450 (1974)).

134. *Id.* at 287; *see also* FED. R. CIV. P. 52(a) (codifying "clearly erroneous" standard of review for findings of fact in civil cases in federal court).

135. *Pullman-Standard*, 456 U.S. at 293.

136. 475 U.S. 709 (1986).

137. *Pullman-Standard*, 456 U.S. at 292.

138. *Icicle Seafoods*, 475 U.S. at 710.

the question being whether the plaintiffs were "seamen" within the meaning of 29 U.S.C. § 213(b)(6). The district court concluded that they were seamen because they "performed work of a maritime character on navigable waters."[139] The court of appeals, however, held that the district court had failed to use the proper test for determining whether plaintiffs were seamen.[140] The proper test, in the Ninth Circuit's opinion, was whether the plaintiffs' "duties primarily aid[ed] navigation of the vessel."[141] Since the district court had not made any findings on this reframed issue, the court of appeals reviewed the record independently and found that the plaintiffs' duties were chiefly those of industrial maintenance and not in aid of navigation.[142] The Supreme Court vacated, stating:

> We think that the Court of Appeals was mistaken to engage in such fact finding.... If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings.... But it should not simply have made factual findings on its own.
>
> 'The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.'[143]

The Supreme Court alluded to three possible rationales for requiring remand to the district court. The Court recognized that the district court is better able to judge witnesses' credibility. However, the Court expressly denied that this constituted a sufficient reason to remand.[144] The decision to remand was supported by two additional rationales. First, the district court's experience with fact finding gave it special expertise in that exercise. The second—which taken in its entirety does not quite make sense in the *Icicle Seafoods* context since there was no district court determination under the correct test to "duplicate"—

139. *Id.* at 711.

140. Worthington v. Icicle Seafoods, 774 F.2d 349, 353 (9th Cir. 1985), *vacated*, 475 U.S. 709 (1986).

141. *Id.* (relying on 29 C.F.R. §§ 783.31, 783.33, 783.36 (1985)).

142. *Id.*

143. *Icicle Seafoods*, 475 U.S. at 714 (quoting Anderson v. Bessemer City, 470 U.S. 564, 574-75 (1985)).

144. This denial seems plausible. *See infra* text accompanying notes 146-48.

seemed to suggest that appellate courts offer little help to advance the fact-finding process.

Given these rationales, is one to conclude that the prohibition against appellate court fact finding is founded upon superior district court expertise? Perhaps. It could not be gainsaid that district judges in general have a keener eye for the mien of an untruthful witness than do their appellate siblings. It may even be that district judges develop an especially acute knack for extracting the subtle inference from otherwise inscrutable declarations and deposition transcripts. The recent amendment of Rule 52(a), extending the "clearly erroneous" standard of review to district court findings based exclusively on documentary evidence, appears to recognize that phenomenon.[145]

But expertise, even in the loosest sense of the term, was hardly necessary for the findings the Fifth Circuit made in *Pullman-Standard* and the Ninth Circuit made in *Icicle Seafoods*. Just as Justice Marshall had pointed out the irrefutable finding of discriminatory intent based on the record in *Pullman-Standard*, Justice Stevens was quick to point out that the facts in *Icicle Seafoods* were undisputed.[146] The record showed, and the defense had conceded in oral argument before the Ninth Circuit, that the vessel remained anchored most of the time and that plaintiffs "primarily monitored, maintained and repaired the processing machinery and electric power generators."[147] Undoubtedly the question of how the plaintiffs spent their time on board the vessel was, as the majority stressed, a question of fact.[148] But if there was some subtlety to be detected from the record beyond monitoring, maintaining, and repairing machinery—a subtlety that could be unearthed only by special fact-finding expertise—it was, understandably, lost on Justice Stevens.

At the conclusion of his dissent, Justice Stevens stated (albeit without citation) that appellate courts in general and the Supreme Court in particular have in the past applied the correct legal standard to undisputed facts as they appeared in the record.[149] Allowing an appellate court to make such findings, he argued, would promote the " 'just, speedy, and inexpensive determination' " of civil actions envisioned by Federal Rule of Civil Procedure 1.[150] Most important, Justice Stevens

145. FED. R. CIV. P. 52(a) now states, "Findings of fact, *whether based on oral or documentary evidence*, shall not be set aside unless clearly erroneous" (emphasis added).

146. *Icicle Seafoods*, 475 U.S. at 715 (Stevens, J., dissenting).

147. *Id.* at 715.

148. *Id.* at 710-11.

149. *Id.* at 716.

150. *Id.* (quoting FED. R. CIV. P. 52(a)).

correctly pointed out that the " 'rationale for deference to the original finder of fact' . . . embodied in Rule 52(a) does not compel the entirely unrelated proposition that only District Courts may make such findings."[151] Even if one considers the rationale for such deference to the district court to be that court's superior expertise, that rationale provides no explanation for an absolute rule prohibiting appellate fact finding in situations where the district court's superior expertise could not be of any benefit.

### 3. *Explaining the Appellate Fact-Finding Cases*

The most plausible explanation for *Pullman-Standard* and *Icicle Seafoods* is that the legitimate role of the appellate courts is restricted to the formulation and development of generally applicable rules. The Court in *Pullman-Standard* clearly stated that " 'factfinding is the basic responsibility of district courts, rather than appellate courts' . . . ."[152] Yet there is no express statutory prohibition against fact finding by appellate courts. Rule 52(a) simply states that, in non-jury cases,

> the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 . . . .
>
> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.[153]

The only possibly prohibitive language in this rule is that the trial court "shall be given" the opportunity to judge witnesses' credibility. It follows that since judging the credibility of witnesses is an inseparable component of the fact-finding process, appellate fact finding always denies the trial court an opportunity to judge witnesses' credibility.

But credibility determinations are *not* always inseparable from fact finding. They may be inseparable from fact finding when testimony conflicts with other testimony, or when it conflicts with other established facts. Many facts, however, can be found in documentary evidence and are entirely independent of a witness's credibility. Others can be found on the strength of uncontroverted testimony. Still other facts can be found by stipulation. In other words, the problem with the argument that appellate fact finding is prohibited by Rule 52(a) is that the clause in

151. *Id.* (quoting Anderson v. Bessemer City, 470 U.S. 564, 574 (1985) (citation omitted)).

152. Pullman-Standard v. Swint, 456 U.S. 273, 291 (1982) (quoting DeMarco v. United States, 415 U.S. 449, 450 n.* (1974)).

153. FED. R. CIV. P. 52(a).

question—"and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses"—makes equal sense whether or not appellate courts are empowered to find facts on their own. The point of the clause is to remind an appellate court that a trial judge has the advantages of observing a witness's demeanor. This reminder is just as helpful when an appellate court is trying to decide whether to set aside district court findings or whether to make findings on its own. If the appellate court is making its own findings, the clause simply counsels that same heightened sensitivity to the trial court's superior vantage point as when an appellate court tries to decide between making its own findings and remanding for findings. Just as "due regard" for the trial court's superior vantage point does not always require an appellate court to uphold a particular finding, it does not always require an appellate court to remand for findings.

If there exists no express statutory prohibition against appellate court fact finding, upon what reasoning could the Court's conclusions in *Pullman-Standard* and *Icicle Seafoods* have been based? Another possibility might be simply that tradition, and not statutory structure, holds fact finding to be exclusively the charge of trial courts.[154] It is undoubtedly true that there is a tradition of leaving fact finding to trial courts. But there must be more to this than meets the eye. The correlation between the Court's decisions and tradition must be a spurious one. For it is highly questionable whether the Supreme Court would, in the name of tradition alone, with no more fundamental concept at stake: (1) grant certiorari in cases with no other discernable value as precedent; and (2) set aside the court of appeals' findings of fact where it was clear that affirmance would save considerable expenditures of litigant and judicial resources.

Another possible, albeit cynical, objection to this explanation for the Court's insistence upon remand in *Pullman-Standard* simply might be that the majority was unsympathetic to the merits of the plaintiffs' claims. Thus the Court may have insisted on remand to avoid either having to hold in the plaintiffs' favor or having to dispute with considerable embarrassment the existence of discriminatory intent when such strong evidence of it appeared throughout the record. Cynicism notwithstanding, this explanation fails to account for two things. First, Justice Brennan—whose record in race relations cases is well known—not only

154. I do not wish to plunge the discussion into a spirited debate over how tradition differs from policy or positive law; suffice to say that here I mean tradition in its weakest sense—a practice that has been followed consistently for reasons unknown or long forgotten.

joined in the result, but in the majority opinion. Second, the Court did not need to confront the evidence directly in order to reverse the Fifth Circuit's ultimate holding that the seniority system violated § 703(h). Because it found that the existence *vel non* of discriminatory intent was a "pure question of fact, subject to Rule 52(a)'s clearly-erroneous standard," the Court only needed to hold that the district court's finding of no discriminatory intent was not clearly erroneous.[155] The Court must have realized that it could have simply stressed the well-established high degree of deference owed under the "clearly erroneous" standard,[156] instead of relying upon a proposition (requirement of remand) for which there was no direct precedential authority.[157]

There seems to be only one explanation that adequately accounts for the requirement of remand on the facts in *Pullman-Standard* and *Icicle Seafoods*: the notion that the only proper function of a federal appellate court in reviewing a district court's work product is to supervise the development of coherent doctrine. As for *Pullman-Standard*, the real difficulty with the Fifth Circuit's determination that IAM had intended to discriminate when it established the seniority system is not that the court was without jurisdiction to make the determination, or that the district court had a better vantage point or superior expertise, or that the decision broke with a tradition of trial court responsibility for fact finding. The difficulty was that there was no means by which the Fifth Circuit could have made the determination in a principled way—in a way that could be explained by reference to a general rule.

This is not to say that the Fifth Circuit could not have made a correct decision, only that it was not possible for it to make a principled one. The correct determination was obviously that IAM had intended to discriminate against blacks. The evidence of the union's desire to segregate the races was unmistakable. At the time of its inception in 1941, the IAM bargaining unit had twenty-four black members. Shortly thereafter, it traded all of its black members to the USW's predecessor organization for two white workers, resulting in an all-white IAM

155. *Pullman-Standard*, 456 U.S. at 287-88.

156. *See* United States v. United States Gypsum Co., 333 U.S. 364, 395 (A reviewing court must not set a finding aside unless left with "the definite and firm conviction that a mistake has been committed."), *reh'g denied*, 333 U.S 869 (1948).

157. The Court's citations to De Marco v. United States, 415 U.S. 449, 450 n.* (1974), and to Kelley v. Southern Pacific Co., 419 U.S. 318, 331-32 (1974), do not fully support the proposition that the usual or general rule was that the court of appeals was *required* to remand the case. Remand in *De Marco* was simply said to be the "better practice," 415 U.S. at 450. Similarly, remand in *Kelley* was said to be "the best course at this point," 419 U.S. at 332.

membership.[158] The evidence of discriminatory intent behind the overall operation of the seniority system was staggering. New departments were created to perpetuate racial segregation at the plant. Between 1947 and 1952, the seniority rosters listed the all-white watchmen and all-black janitors as both in the Safety Department. In 1953, the name of the department was changed to "Plant Protection." By 1954, the Plant Protection Department had only white watchmen, and a newly created Janitors Department had only black janitors.[159]

So IAM's intent to discriminate was clear. But how could the Fifth Circuit explain this determination by reference to a general rule? Any purportedly general rule explaining the determination would be doomed either to overspecificity, which would deny it meaningful precedential value, or to overinclusiveness, which would render it an undesirable and mischievous statement of the law.

One might express a generally applicable rule explaining the court's determination that IAM intended to discriminate as: "Where a union reorganizes its membership in such a way as to produce total racial homogeneity, it must be found to have discriminated intentionally within the meaning of § 703(h)." This proposed rule is superficially attractive, but ultimately unacceptable. It is fatally overinclusive. Suppose the original IAM membership had been composed of twenty-four white janitors and twenty-four black machinists. Further suppose that the original USW membership had been thirty machinists, both black and white, and two white janitors. Under the rule as stated, if IAM finds that representation of its membership can be made more effective by representing only janitors, the trade of the twenty-four black machinists for the two white janitors would be deemed intentional discrimination on the basis of race when in reality race played no motivating factor in the reorganization. There are countless other reasons why unions might reorganize in a way that, because of an incidental or spurious correlation to race, produces a one-race membership.

The problem, of course, is that the discriminatory intent behind IAM's membership "reorganization" only becomes obvious when placed in its full context. It took place in the early 1940s in the fully segregated town of Bessemer, Alabama; at a plant where whites monopolized the

158. Swint v. Pullman-Standard, 624 F.2d 525, 531 (5th Cir. 1980), *vacated*, 110 S. Ct. 316 (1989).

159. *Id.* at 531-32.

high-prestige, well-paid positions; for an employer that mysteriously created and abolished entire departments in a way that effectively perpetuated both white monopolization of desirable positions and segregation between white and black workers. To avoid overinclusiveness, a generally applicable rule explaining the Fifth Circuit's determination of discriminatory intent would have needed to incorporate the factual context of the Pullman-Standard dispute. But an attempt to build context into the rule would destroy its generality and rob it of any meaningful precedential value. Imagine the following "rule," reminiscent of all too many headnotes in *West's Decennial Digest*:

> Where union at plant in fully-segregated town whose highest-paying positions were monopolized by workers of one race and which had history of mysteriously appearing and disappearing departments, effect of which was to perpetuate said monopolization and segregation, traded twenty-four workers of first race for two workers of second race, resulting in entire union membership of first race, said union intentionally discriminated on basis of race within meaning of § 703(h).[160]

A highly contextual rule such as this has virtually no precedential value. It is inconceivable that a future case would contain identical facts. At the same time, such a rule contains no guidance as to which of the facts are critical to the determination of discriminatory intent. Would the rule still apply if the town had been partially segregated instead of fully segregated? If the plant had one black supervisor? If the first union had traded two black workers instead of twenty-four? If the issue had been gender instead of race? A future court would be left clueless.

As would be expected, the Ninth Circuit in *Icicle Seafoods* also failed to articulate a general rule explaining its finding that plaintiffs' "maritime work was incidental and occasional, taking but a small portion of the work time."[161] This finding was critical not only to the Ninth Circuit's ultimate holding that plaintiffs were not seamen, but also to the Supreme Court's determination that such a finding could be made only

160. In fact, the publisher made no attempt to create a headnote encompassing this "rule," instead opting for a headnote concentrating on the applicability of the "clearly erroneous" standard:

> Findings of fact by district court in Title VII cases are not to be set aside unless they are clearly erroneous, i.e., unless appellate court is left with definite and firm conviction that a mistake has been committed; however, where findings are made under an erroneous view of controlling legal principles, clearly erroneous rule does not apply and findings may not stand. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C. § 2000e et seq.

Swint v. Pullman-Standard, 624 F.2d 525, 525 (5th Cir. 1980), *vacated*, 110 S. Ct. 316 (1989).

161. Worthington v. Icicle Seafoods, Inc., 774 F.2d 349, 353 (9th Cir. 1985), *vacated*, 475 U.S. 709 (1986).

by the district court.[162] It is difficult even to imagine what a general rule explaining this determination might look like. The Court merely conceded that the determination was based on the record and on counsel's concession at oral argument that the vessel remained anchored most of the time.[163] If the best general rule that can be formulated to explain this determination is something like, "Totality of record on appeal established that maritime work occupied a small portion of work time," then its lack of precedential value should be obvious.

### B. The School Desegregation Cases of the 1970s

The appellate fact-finding cases are not the only Supreme Court decisions animated by the notion that the proper appellate function is restricted to the maintenance of doctrinal coherence and uniformity. It has been observed that the school desegregation cases of the 1970s, beginning with *Swann v. Charlotte-Mecklenburg Board of Education*,[164] featured an especially narrow scope of appellate review with respect to sweeping, district court-imposed remedial schemes.[165] The limited scope of review over such remedial schemes ultimately stems from the same basic view of the appellate role articulated in the fact-finding cases.

#### 1. *The Narrowness of Appellate Review Over District Court-Imposed Remedial Schemes*

The Supreme Court's 1968 decision in *Green v. County School Board*[166] opened a new era in school desegregation. Gradualism was dead.[167] "The burden on a school board today," stated Justice Brennan's impatient opinion for the Court, "is to come forward with a plan that promises realistically to work, and promises realistically to work *now*."[168] At the same time, the Court clearly recognized that quick results would require a great deal of district court discretion over choice of remedies:

> The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation;

162. *See supra* note 143 and accompanying text.

163. *Icicle Seafoods*, 774 F.2d at 353.

164. 402 U.S. 1 (1971).

165. *See, e.g.*, Fletcher, *supra* note 103, at 681 ("[T]he Court has been willing to disregard to a remarkable degree in the school cases the normal constraints on the judiciary.").

166. 391 U.S. 430 (1968).

167. F. Read & L. McGough, Let Them Be Judged 472-94 (1978).

168. *Green*, 391 U.S. at 439.

> there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance.[169]

This passage raises two points. The first point is that school desegregation presents courts with polycentric problems; the movement of one strand in the spider's web creates dislocations throughout the rest of it.[170] The second point, which foreshadows the remedial approach of *Swann*, is that the Supreme Court and courts of appeals would have to make a corresponding concession in their review of such remedial plans. Because there was no "universal answer" to the problems of desegregation, federal appellate courts could not be too exacting in their scrutiny of the district courts' remedial plans.

In *Swann*, the district court had adopted the remedial plan submitted by a court-appointed expert.[171] The plan restructured school attendance zones to achieve greater racial balance in senior high schools, but maintained existing grade structures and used no "pairing" or "clustering" of schools to supplement the redrawing of zones. The plan also ordered some busing of senior high school students.[172] The plan also relied on the redrawing of attendance zones for junior high schools, but in addition created some "satellite" (i.e., non-contiguous) zones, resulting in the substantial desegregation of all junior high schools in the system.[173] Saving its most aggressive approach for the elementary schools, the plan supplemented rezoning with the clustering of twenty-four suburban schools and nine inner-city schools.[174] The Supreme Court unanimously affirmed, leaving no doubt about the breadth of district court discretion to fashion an appropriate remedial scheme once a constitutional violation had been shown. " 'The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case,' " the Court announced.[175] The Court later referred more directly to the applicable mode of review:

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169. *Id.*

170. The spider web metaphor is Lon Fuller's. *See* Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 395 (1978). For further evidence of the Court's recognition that school desegregation cases present polycentric problems, see Charlotte-Mecklenburg Bd. of Educ. v. Swann, 402 U.S. 1, 31 (1971) ("The reconciliation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets.").

171. *Swann*, 402 U.S. at 10.

172. *Id.* at 8-9.

173. *Id.* at 9.

174. *Id.* at 10.

175. *Id.* at 15. This statement had made an interesting journey. The full quotation is from Hecht Co. v. Bowles, 321 U.S. 321, 329-330 (1944) (statutory jurisdiction to grant injunctions should be exercised in light of general equitable principles):

> The Court of Appeals, searching for a term to define the equitable remedial power of the district courts, used the term 'reasonableness.' In *Green, supra*, this Court used the term 'feasible' and by implication, 'workable,' 'effective,' and 'realistic' .... On the facts of this case, we are unable to conclude that the order of the District Court is not reasonable, feasible and workable. However, in seeking to define the scope of remedial power or the limits on remedial power of courts in an area as sensitive as we deal with here, words are poor instruments to convey the sense of basic fairness inherent in equity. Substance, not semantics, must govern ....[176]

*Swann* probably marked the zenith of Supreme Court rhetoric concerning the breadth of district court remedial discretion. Nonetheless, for the balance of the decade the Court continued to exercise little scrutiny over the remedial means district courts employed to achieve permissible ends. Although it may appear that the Court's 1976 decision in *Pasadena City Board of Education v. Spangler*[177] retreats somewhat from statements in *Swann*, this appearance is misleading. In *Spangler*, after finding a constitutional violation, the district court ordered the school board to devise a plan that, *inter alia*, permitted no school in the system to have a majority of minority students.[178] Since the district court retained supervisorial jurisdiction over the case,[179] the effect was to extend the remedy even to resegregation caused by a "quite normal pattern of human migration" unaided by state action.[180] Four years after the entry of the decree, the board moved to eliminate the "no majority" requirement. The district court denied the motion and a divided court of appeals panel affirmed the denial.[181]

The Supreme Court, per Justice Rehnquist, vacated the judgment, but not because of any disagreement with the district court's choice of

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> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

The statement was picked up and paraphrased by the Court in Brown v. Board of Education (*Brown II*), 349 U.S. 294, 300 (1955), apparently for the purpose of persuading the district courts to smooth off the hardest edges of the desegregation principle— i.e., to move with "all deliberate speed." *Id.* at 301. The *Swann* Court used the statement for quite the opposite purpose—to urge the district courts to use their equitable discretion to achieve desegregation quickly.

176. *Swann*, 402 U.S. at 31.

177. 427 U.S. 424 (1976).

178. Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501, 504-05 (1970).

179. *Id.* at 505.

180. *Spangler*, 427 U.S. at 435.

181. Pasadena City Bd. of Educ. v. Spangler, 519 F.2d 430 (9th Cir. 1975).

remedies.[182] The district court had simply misapprehended the ultimate remedial goal. What had been ambiguous in *Swann* and *Davis v. Board of School Commissioners*[183] was now becoming clear in *Spangler*: The only permissible goal of a district court remedial scheme was to place the school system in the position it would have occupied but for the unconstitutional state action.[184] In other words, a district court was authorized to remedy only de jure, and not merely de facto, segregation.[185] That principle was not clear when *Swann* was decided.[186] All the Court found in *Spangler* was that the scope of the remedy extended beyond the scope of the constitutional violation, not that the *form* of the remedy was invalid. *Spangler*, therefore, does not represent a limitation on district courts' broad discretion as to the form of a remedial plan in school desegregation litigation.

The Detroit desegregation litigation continued the pattern established in *Spangler*. In *Milliken v. Bradley* (*Milliken I*)[187] the Court vacated the district court-imposed interdistrict remedy on the ground that the record established no interdistrict constitutional violation. On remand, after the district court had confined its remedy to the area in which the unconstitutional conduct had been proven, the question was whether the district court had exceeded its remedial authority by ordering certain types of remedial education in addition to pupil reassignment. The district court had ordered the institution of a remedial reading and communications skills program; the formulation of a comprehensive in-service teacher training program; the institution of a new testing program free of racial, ethnic, and cultural biases; and the provision of both psychological and vocational counselors.[188] The court's order came after extensive consultation with both the local and state boards of education.[189] The Supreme Court affirmed the modification of the curriculum

182. *Spangler*, 427 U.S. at 441.

183. 402 U.S. 33 (1971).

184. *See* Kanner, *From Denver to Dayton: The Development of a Theory of Equal Protection Remedies*, 72 NW. U.L. REV. 382, 399 (1977).

185. The terminology originated in Charlotte-Mecklenburg Board of Education v. Swann, 402 U.S. 1, 17-18 (1971).

186. *See* Fletcher, *supra* note 103, at 677-78. Commentators disagree on exactly when the Court decided that the remedy could not permissibly extend beyond the scope of the constitutional violation. *Compare id.* at 678 (arguing that Court made principle clear in Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189 (1973)) and Kanner, *supra* note 184, at 385-88 (same) *with* Goodman, *Some Reflections on the Supreme Court and School Desegregation*, in RACE AND SCHOOLING IN THE CITY 45, 46 (A. Yarmolinksy, L. Liebman & C. Schelling eds. 1981) (not truly clear until Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977)).

187. 418 U.S. 717 (1974).

188. Milliken v. Bradley (*Milliken II*), 433 U.S. 267, 275-76 (1977).

189. *Id.* at 272-75.

in the remedial scheme. After noting widespread curriculum modifications in desegregation plans by other federal courts throughout the country,[190] as well as the extensive consultation with local school authorities in the case at bar,[191] the Court fell back on its familiar recitations about the breadth of district court remedial discretion.[192]

Two later decisions also provide ringing endorsements of the district court's remedial discretion in school desegregation cases. In both *Columbus Board of Education v. Penick*[193] and *Dayton Board of Education v. Brinkman (Dayton II)*[194] the Court affirmed systemwide remedial schemes imposed by district courts. In each case, once the Court was satisfied that the goal of systemwide desegregation was commensurate with the scope of the constitutional violation,[195] it exhibited no interest in subjecting the district court's remedial methodology to serious scrutiny.

Despite outward appearances, it does not seem that the Court has abandoned its "hands-off" approach to district court remedies in its recent decision of the Yonkers desegregation case, *Spallone v. United States*.[196] The United States brought an action against the city of Yonkers, New York, and its community development agency, alleging that the city had intentionally enhanced racial segregation in housing. The district court held the defendants liable for violations of Title VIII of the Civil Rights Act of 1968 and of the Equal Protection Clause.[197] The

190. The Court was, however, careful to withhold its formal approval of the specific holdings of such other cases. *Id.* at 286 n.17.

191. *Id.* at 287 n.18.

192. The Court stated:

> . . . nor do we find any other reason to believe that the broad and flexible equity powers of the court were abused in this case. . . . The District Court, in short, was true to the principle laid down in *Brown II*:
>
> 'In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power.'

*Id.* at 288 (citations omitted).

193. 443 U.S. 449 (1979).

194. 443 U.S. 526 (1979).

195. Professor Goodman has argued that in *Columbus* and *Dayton II* the Court backed away from its insistence, so evident in *Spangler*, that there be a close nexus between the constitutional violation and the harm suffered. Goodman, *The Desegregation Dilemma: A Vote for Voluntarism*, 1979 WASH. U.L.Q. 407, 408-11. Along somewhat similar lines, Professor Fletcher has argued that in both cases the Court's analytic approach is one "in which the tie between constitutional violations and remedial orders is extremely loose." Fletcher, *supra* note 103, at 680.

196. 110 S. Ct. 625 (1990).

197. United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276 (S.D.N.Y. 1985).

district court then entered a remedial decree with both negative (prohibitory) and affirmative components.[198] The court enjoined "the City of Yonkers, its officers, agents, employees, successors and all persons in active concert or participation with any of them" from "intentionally promoting racial residential segregation in Yonkers."[199] The court also ordered the city to take affirmative steps to disperse public housing throughout all residential areas of Yonkers.[200] After much stalling and recalcitrance, the city council finally approved a consent decree that required the council to enact legislation that would create incentives for developing public-assisted housing. The city council, however, failed to enact the legislation mandated by the decree. Some members of the council defied the consent decree in order to catapult themselves to instant popularity with neighborhood activists. At a hearing on the issue, the district court announced that the city *and its councilmembers* would be subject to contempt sanctions if the legislation were not enacted by a date certain. The sanctions included fines against the city that started at $100 per day and doubled each day the city failed to comply, as well as fines of $500 per day against each councilmember who refused to comply.[201] Shortly thereafter, the Second Circuit affirmed the contempt adjudications against both the city and its councilmembers. However, it capped the fines against the city at $1 million per day.[202] The Supreme Court granted a stay as to the councilmembers, but denied it as to the city.[203] Finally, the council capitulated and enacted the required legislation.

On the merits, the Supreme Court reversed the contempt adjudications against the councilmembers.[204] The opinion authored by Chief Justice Rehnquist mentions several possible grounds for reversal.[205] Viewed in gross, the opinion does not seem to indicate an intent to restrict the

198. United States v. Youkers Bd. of Educ., 635 F. Supp. 1577 (S.D.N.Y. 1986).

199. *Id.* at 1577. The language of the injunction, of course, is the boilerplate inspired by the limits of FED. R. CIV. P. 65(d), which states in pertinent part: "Every order granting an injunction and every restraining order . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

200. *Yonkers Bd. of Educ.*, 635 F. Supp. at 1577-83.

201. Spallone v. United States, 110 S. Ct. 625, 630 (1990). The Supreme Court's opinion mentions the possibility of imprisonment under the district court's order but does not elaborate.

202. United States v. Yonkers, 856 F.2d 444 (2d Cir. 1988).

203. Spallone v. United States, 109 S. Ct. 14 (1988).

204. *Spallone*, 110 S. Ct. 625.

205. The opinion hints at three reasons for reversal: (1) The councilmembers were neither parties to the action nor named in the order requiring legislation to be enacted; (2) the district court failed to use the least intrusive contempt sanctions capable of securing compliance; and (3) the contempt sanctions created a conflict of interest for the councilmembers, forcing them to choose

ability of district courts to devise remedial decrees or even to enforce such decrees via the contempt power. Rather, the Court seems only to be saying that lower courts should be extremely hesitant to impose coercive measures of a personal nature against legislators who refuse to obey court orders to vote a particular way on legislation. Contrasting such personal coercion with coercive measures against the governmental entity, the Court noted that personal coercion creates a potential conflict of interest for the individual legislator.[206] In cases where legislators think that in order to represent their constituencies faithfully they must disobey the court's order, even if that results in sanctions against the governmental entity, *personal* coercive measures will discourage legislators from acting in accordance with their constituents' wishes. Personal fines in such a situation will "encourage legislators, in effect, to declare that they favor an ordinance not in order to avoid bankrupting the city for which they legislate, but in order to avoid bankrupting themselves."[207]

Clearly, the Court was primarily concerned with maintaining the appearance of independence and integrity in the legislative process and not with limiting district courts' broad remedial discretion. The Court refused to review staggering fines against the city itself. Moreover, the Court noted the possibility of two other measures that the district court had considered but rejected: First, the district court could simply have deemed that the required legislation had been enacted; or second, the district court could have transferred housing prerogatives from the city council to a court-appointed commission.[208] Although these measures seem as drastic as levying fines against individual councilmembers, they do not exploit the important political symbolism of a legislator's "aye" response to a roll call. In sum, the Court's reversal of the contempt sanctions against individual legislators in *Spallone* does not signal a general retreat from granting district courts broad remedial discretion in desegregation litigation.

### 2. *Explaining Limited Review: "Polycentricity" and Principle*

The restraint that the Supreme Court demonstrates when it reviews the school desegregation remedies of lower courts can be explained fairly

between their perception of what was best for their constituents and what was best for their personal finances. *Id.* at 632-34.

206. *Id.* at 633-34.

207. *Id.* at 634. Despite considerable discussion of the doctrine, however, the Court carefully avoided basing the decision at bar on absolute legislative immunity. *Id.* at 633-34.

208. *Id.* at 634.

easily. Professor William Fletcher has argued that it is the "non-legal" polycentricity of the remedial phase of institutional reform litigation that requires the trial court to have such broad discretion.[209] According to Fletcher, "legal" polycentricity exists when litigation contains multiple claimants of right, each with legally protectible interests.[210] Non-legal polycentricity exists when litigation implicates the competing interests of people or entities who have made no legally cognizable claim at bar.[211] School desegregation litigation is legally unicentric insofar as it implicates only one legally cognizable right: that of children to attend a school system free of state-sanctioned racial discrimination. But the remedial phase cannot avoid being non-legally polycentric because it implicates the varying interests of a wide range of people, such as children's interests in attending schools near their residences, parents' interests in their children's safety, local school boards' interests in controlling the operation of their systems, and state governments' interests in controlling the costs of school operation.

Fletcher is undoubtedly correct when he says that the non-legal polycentricity of school desegregation litigation requires broad remedial discretion at the trial court level.[212] For purposes of the present inquiry, however, it is necessary to tease out specifically why polycentricity precludes an appellate court from reaching an equally satisfactory remedy. One explanation might be that appellate courts wish to maximize the district judges' bargaining power with potentially recalcitrant school officials or board members. Once the district court finds the defendant liable, desegregation litigation takes on the quality of protracted political negotiation.[213] The mode of the proceedings moves from formal proofs and reasoned arguments to talk of what can be done, how soon, and at what cost. An appellate court might well want to bolster the district court's negotiating strength by creating the impression that no higher authority will intervene.

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209. Fletcher, *supra* note 103, at 645-49.

210. The example he gives is a lawsuit in which multiple claimants assert rights to limited water resources. *Id.* at 645-46.

211. *Id.* at 646.

212. Here I use the term discretion in both its primary and secondary senses. See Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635, 636-37 (1971) for a discussion of primary and secondary discretion. As long as the scope of the remedy is commensurate with the scope of the constitutional violation, the district court's *choice* of remedies is unconstrained by rules; moreover, even to the degree that appellate judges disagree with the choice actually made, the decision will be insulated from reversal.

213. *See, e.g.*, Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976).

On the other hand, it is hard to see exactly how this phenomenon distinguishes institutional reform cases from other complex litigation. However one defines "complex litigation"— whether the key attribute is a big bottom line or issues of great legal or factual sophistication—at some point the proceedings predictably slide into the give and take of negotiation. The bargaining may take place over the appointment of a special master, whether for remedial or pretrial purposes;[214] it may concern the structuring and costs of notice in class actions; it may concern the computation of attorney's fees; or it may concern one of the many unforeseen developments that spring up during trial in what amounts to an immensely complex, unrehearsed event.[215] Yet district courts do not possess the same breadth of discretion to decide these matters as they have in formulating remedial plans in institutional reform litigation.[216] That is not to say district courts ought not have such discretion. Rather, it merely demonstrates that the broad discretion that district court judges possess in institutional reform cases cannot be explained solely by pointing to the desirability of increased bargaining power for district court judges in these cases. Such power, after all, would be useful in a wide variety of cases.

Another possible explanation is that appellate courts defer to district courts in the remedial phases of desegregation cases because they believe that district courts have special expertise to formulate workable decrees. Appellate courts may reason that through sheer repetition, district courts have developed special expertise that enables them to manage the reconstructive operations under fluid conditions with multiple variables. The fluidity comes from changing residential patterns and budgetary constraints. The variables include differences in personalities, physical plant from campus to campus, and uniqueness in geography (e.g., highways or

214. *See generally* W. BRAZIL, G. HAZARD & P. RICE, MANAGING COMPLEX LITIGATION: A PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS (1983) (discussing the appointment of special masters during remedial and pretrial phases of large litigation); Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394 (1986) (same); Levine, *The Authority For the Appointment of Remedial Special Masters in Federal Institutional Reform Litigation: The History Reconsidered*, 17 U.C. DAVIS L. REV. 753 (1984) (same).

215. W. BRAZIL, G. HAZARD & P. RICE, *supra* note 214, at 84 ("A big trial is quintessentially a complex unpracticed event.").

216. With respect to the appointment of special masters, see La Buy v. Howes Leather Co., 352 U.S. 249 (1957); *see also* Levine, *supra* note 214, at 763 (characterizing *La Buy*'s requirements for references to special masters as "strict").

With respect to cost-shifting for FED. R. CIV. P. 23(c) notice, see Oppenheimer Fund v. Sanders, 437 U.S. 340 (1978) (costs of class notice must be borne by class representative).

With respect to computation of attorney's fees, see, e.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711 (1987) (curtailing federal district courts' discretion to award risk multipliers).

rivers that divide otherwise contiguous metropolitan areas). The appellate court may also believe that it is better for a single judge (the district court) than for three judges (the appellate panel) to undertake the reconstructive enterprise, and that the district court is not only closer to the sources of information necessary for the process of reform but also more sensitized to the local political processes latent in all desegregation litigation.

The expertise theory suffers from at least two serious deficiencies. First, when appellate courts reason that district courts have greater expertise at reconstructive operations than do appellate courts, they create a largely self-fulfilling prophecy. Federal appellate courts could presumably develop similar expertise if they simply began to review remedial plans extensively. Although federal district judges generally have more trial experience in their backgrounds than do federal circuit judges, there is no reason to believe that circuit judges are any less capable of developing the same managerial expertise, given the proper exposure. Moreover, approximately three out of every eight United States circuit judges were formerly United States district judges and thus presumably already possess the necessary expertise.[217] In light of these considerations, it seems quite implausible that "superior district court expertise" could be the true reason for the district courts' broad remedial discretion in the desegregation cases.[218]

The second deficiency in the expertise theory is simply that it proves too much; district judges handle more repetitions of just about everything than do appellate judges. It is certainly true that they manage more reconstructive operations in institutional reform litigation, but they also interpret more statutes and regulations and decide more constitutional claims. They handle more cases, period. For that matter, district courts are called upon to "declare the law"—not in the rulemaking sense, but in the divination sense—far more often than are appellate courts.

217. *See* Judges of the Federal Courts, 901 F.2d VII-XXX (1990) (Eighty-one of 206 current circuit judges are former district judges, not counting the Federal Circuit.).

218. The possible explanation that district judges are more "sensitized" to local political sentiments and processes brings two things to mind. First, rightly or wrongly, the Supreme Court has not shown much interest in whatever increased sensitivity district judges might possess in desegregation litigation. *See, e.g.*, Watson v. City of Memphis, 373 U.S. 526 (1963) (reversing the district court's lengthening of time for desegregation of public parks in response to public hostility); Cooper v. Aaron, 358 U.S. 1 (1958) (upholding reversal of district court's order suspending a desegregation program for two and one-half years in response to state-sponsored violent resistance). Second, history suggests that district judges are more than capable of alienating themselves from local populations. *See* F. READ & L. MCGOUGH, *supra* note 167, at 154 (noting repeated violence and threats of violence against federal district judges, including Judge J. Skelly Wright).

Yet no one would dream of suggesting that this greater wealth of practice should cause appellate courts to defer to district courts' expertise in law declaration.[219]

This is not to say that the aforementioned theories do not at least partially explain the broad discretion of district courts in institutional reform cases. Justices who have comprised the majorities in desegregation cases have probably adverted, and perhaps subscribed, to one or more of these theories. But the most plausible reason for creating and maintaining the district court's broad zone of remedial discretion in the desegregation cases seems to be that appellate review of remedial methodology can have little precedential value. Virtually by definition, the presence of non-legal polycentricity in the remedial phase of school desegregation litigation means an absence of legal standards by which to formulate *or review* a remedial scheme. Of course, appellate courts have been able to define an outer limit to the permissible scope of a remedial scheme. For example, the Supreme Court has clearly thought it possible to explain its reversals by reference to the rule that the remedy must be commensurate to the constitutional violation.[220] After all, if the plaintiffs have proven de jure segregation or the effects thereof in only one district, then the general rule provides a principled way of striking down an interdistrict remedy. But approving or disapproving any particular intradistrict remedial scheme would be another thing altogether. If none of the means, individually or in the aggregate, exceeds the scope of the constitutional violation, then on what basis should the appellate court review them?

To be sure, it would be possible for an appellate court to insist that the district court employ the least intrusive means available to remedy the constitutional violation. But this would not entail the same type of appellate inquiry as determining whether an interdistrict remedy is supported by allegation and proof of an interdistrict wrong. Rather, it would require the appellate court to weigh each of the competing interests at stake and then compare the degree to which each constitutionally permissible remedial scheme would damage those interests. Private sector planners and public policy makers can select an optimum course by

219. An exception is the rule that a federal court of appeals defer to a federal district judge's interpretation of state law when the district judge sits in the state whose law is being interpreted. *See* Coenen, *To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law*, 73 MINN. L. REV. 899 (1989).

220. *See supra* notes 184-86 and accompanying text. Whether the rule actually offers a satisfactory explanation of the results in cases like *Spangler* and *Dayton I* is another matter.

this ad hoc method; they justify their decisions not by referring to a general rule, but by pointing to favorable results. If profits are up next quarter, or if unemployment is down, then the decision was justifiable. An appellate court cannot justify its decisions in such a way. Appellate courts are often called upon to choose an optimum course in response to a problem, but only in the abstract, and the court is expected to stay the course once it is chosen. Assigning weights to various interests and comparing degrees of damage done to those interests by alternative courses of action constitutes decision making of a kind that normally cannot be reconciled to principle.

Imagine if the Court had attempted rigorous review of the district court's remedy in *Milliken*. Recall that the district court had ordered the school district to institute various remedial education programs.[221] Would it be possible for the Supreme Court to find some principle, rooted in the fourteenth amendment, that permitted the district court to impose a reading skills program, but not bias-free skills and aptitude testing, or vice-versa? For example, could the Court articulate a theory under which a federal district court remedy may require in-service teacher training, but at the same time under which that remedy would cross into the impermissible realm of "social engineering" if it were to require the school to provide psychological counselors to ease the students' transition into a desegregated system? Any such attempts to draw these distinctions in a principled way seem doomed to failure.

It is difficult to conceive of examples that would make meaningful appellate review of such a remedial plan less absurd without at the same time making it unprincipled and therefore of little or no precedential value. Suppose one were to frame the question on appeal as whether a district court was *ever* empowered to order remedial education programs (as opposed to merely pupil reassignment) as the response to a finding of unconstitutional school segregation. A firmly negative answer to this question would certainly constitute a generally applicable rule that would make a reversal of the district court's remedial scheme in *Milliken* principled. But such a rule would not make any sense as equal protection doctrine. If *Brown v. Board of Education*[222] established that unconstitutional segregation by itself diminished the quality of black students' educations,[223] how could the Court then say that the district courts' power

221. Milliken v. Bradley (*Milliken I*), 418 U.S. 717 (1974); *see supra* text accompanying note 187.

222. 347 U.S. 483 (1954).

223. *See id.* at 493-94, 494 n.11.

to eliminate from the public schools "all vestiges of state-imposed segregation"[224] somehow failed to encompass remedial education aimed at restoring such diminutions? Once the Court had tied segregation to the quality of education, and once it had decided that the federal judiciary was to reverse segregation's effects, the Court was forced to tolerate the broad range of educational remedies that the district court would impose.

### C. Distinguishing the Independent Review Doctrine

One might object that, notwithstanding the appellate fact-finding and school desegregation cases, the Supreme Court has demonstrated elsewhere that it believes that appellate courts should rigorously scrutinize trial courts' application of law to fact. To support this objection, one might point to a long string of cases in which the Court itself undertook non-deferential review of trial courts' findings of fact or of the application of law to such findings. Actually, however, these cases show only that the Court has been willing to tolerate a more active appellate role in areas where federal constitutional rights are threatened by state court fact finders of questionable trustworthiness. Indeed, many of the individual justices' reactions to these cases reinforce the impression that the Court is most uncomfortable with a general conception of the appellate role that extends beyond the formulation and supervision of broadly applicable rules.

#### 1. *Obscenity*

One obvious example of the Court's exercising independent review of the application of law to facts is the obscenity cases.[225] In a line of decisions stretching from *Roth v. United States*[226] to *Miller v. California*,[227] the Court attempted to lay down general first amendment standards for determining what materials may be suppressed as obscene.[228] Throughout this period, however, the Court reviewed the objectionable

224. Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 200 (1973) (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971)).

225. P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, Hart & Wechsler's The Federal Courts and The Federal System 667 (3d ed. 1988).

226. 354 U.S. 476 (1957).

227. 413 U.S. 15 (1973).

228. In *Roth v. United States*, the Court held that "[o]bscene material is material which deals with sex in a manner appealing to prurient interests." 354 U.S. at 487. Together with Manual Enters. v. Day, 370 U.S. 478 (1962), and Jacobellis v. Ohio, 378 U.S. 184 (1964), the Court had propounded a general rule. According to these cases, three elements had to be satisfied before a work could be classified as obscene: The dominant theme of the material taken as a whole had to appeal to a prurient interest in sex; the material had to be patently offensive because it affronted

materials on a case-by-case basis to determine whether they were constitutionally protected. In *Jacobellis v. Ohio*[229] the Court reversed a state court conviction for possession and exhibition of an obscene film. Justice Brennan, joined only by Justice Goldberg, emphasized that independent review in such cases was necessary to keep fact finders from creating varying local definitions of obscenity and thereby undermining the meaning of the first amendment.[230] Justice Stewart also expressed his willingness to undertake ad hoc review in obscenity cases.[231] But the opinions of Chief Justice Warren (joined by Justice Clark) and Justice Black (joined by Justice Douglas) warned that the Court was stepping beyond its proper role as an appellate court. "This Court is about the most inappropriate Supreme Board of Censors that could be found," Justice Black complained.[232] Chief Justice Warren expressly advocated a deferential standard of appellate review in obscenity cases; he indicated that such a standard was the only reasonable way of preventing the Court from "sitting as the Super Censor of all the obscenity purveyed throughout the Nation."[233]

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contemporary community standards relating to the description or representation of sexual matters; and the material had to be utterly without redeeming social value.

In A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass., 383 U.S. 413 (1966), the three-justice plurality essentially defined obscenity as the Court had in *Roth* and its progeny. The plurality reversed the Massachusetts Supreme Judicial Court's holding that the material in question need not be "unqualifiedly worthless" before it could be deemed obscene. Justice Brennan's opinion acknowledged that a court might be justified in deferring to the prosecution's characterization of a work as totally without social value if there was evidence that, in fact, the book was promoted and purchased only for its prurient appeal. But the Court continued to insist that a work had to be "*utterly* without redeeming social value" to be prohibited as obscene. *Id.* at 419.

Then came Redrup v. New York, 386 U.S. 767 (1967). Believing the definition of obscenity to have been settled, the Court granted certiorari in *Redrup* and two companion cases limited to questions other than the obscenity *vel non* of the materials involved. When the justices got to conference, however, they could not define obscenity to yield a sufficiently unified view on the procedural questions for which certiorari had been granted. All that the seven justices could agree on was that, under any of their divergent views on the definition and protectability of obscenity, the works in the three cases at bar could not be prohibited.

229. 378 U.S. 184 (1964).

230. *Id.* at 193 (Breunan, J., concurring) ("We do not see how any 'local' definition of the 'community' could properly be employed in delineating the area of expression that is protected by the Federal Constitution.").

231. *Id.* at 197 (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be [pornography]. But I know it when I see it, and the motion picture involved in this case is not that.").

232. *Id.* at 196 (Black, J., concurring in the judgment).

233. *Id.* at 203 (Warren, C.J., dissenting).

*Redrup v. New York*[234] represents the nadir of the Court's efforts to provide doctrinal leadership in the obscenity area. The Court failed to articulate any general rule not already offered in previous decisions. Following *Redrup*, the Court embarked on a policy of summary review and per curiam disposition of obscenity cases, disclosing nothing about its rationales or even about the nature of the materials reviewed.[235] In *Miller v. California*[236] the Court admitted that "[t]he *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 states, subjectively judging each piece of material brought before us."[237] Justice Brennan, who had been in the *Redrup* majority, sadly noted that "[b]y disposing of cases through summary reversal or denial of certiorari we have deliberately and effectively obscured the rationale underlying the decisions."[238] But after the Court's 1974 decision in *Jenkins v. Georgia*,[239] the movie reviews slowed to a trickle.[240] Instead, the Court has tended simply to decline ad hoc review of obscenity cases by denying certiorari or (prior to the abolition of its mandatory jurisdiction) dismissing appeals for want of a substantial federal question.[241]

### 2. *Defamation*

Defamation is another notable area where the Court has undertaken detailed, non-deferential scrutiny of the application of law to facts. In *Bose Corp. v. Consumers Union*,[242] after a bench trial, the district court held for the plaintiff on its product disparagement claim. The district court found that the plaintiff had carried its burden of demonstrating by clear and convincing evidence that the defendant had published a false statement of fact with "actual malice"—i.e., with knowledge of falsity or reckless disregard of truth or falsity.[243] The First Circuit reversed, stating that it was required to conduct a de novo review of the actual malice determination, "independently examining the record to ensure that the district court has applied properly the governing constitutional law

234. 386 U.S. 767 (1967).

235. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 82 n.8 (1973) (Brennan, J., dissenting).

236. 413 U.S. 15 (1973).

237. *Id.* at 22 n.3.

238. *Paris Adult Theatre*, 413 U.S. at 83 (Brennan, J., dissenting).

239. 418 U.S. 153 (1974).

240. *See, e.g.*, Pope v. Illinois, 481 U.S. 497 (1987); Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985); New York v. Ferber, 458 U.S. 747 (1982); Pinkus v. United States, 436 U.S. 293 (1978).

241. *See* P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, *supra* note 225, at 670.

242. 466 U.S. 485 (1984).

243. Bose Corp. v. Consumers Union, 508 F. Supp. 1249, 1277 (D. Mass. 1981), *rev'd*, 692 F.2d 189 (1st Cir. 1982).

. . . ."[244] The Supreme Court granted certiorari to decide whether the court of appeals erred when it refused to review the "actual malice" determination under the "clearly erroneous" standard of Rule 52(a).[245]

The Court affirmed the appellate court's use of de novo review.[246] In doing so, the Court emphasized its own constitutional duty to conduct an "independent," non-deferential examination of the actual malice determination.[247] Justice Stevens's opinion for the Court, joined by Justices Breunan, Marshall, Blackmun, and Powell, stated that the independent examination rule "reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution."[248] The Court traced the independent examination practice back to previous defamation cases,[249] obscenity cases,[250] "fighting words"[251] and incitement cases,[252] and civil rights demonstration cases.[253] Had the Court so desired, it could also have traced the practice to cases involving allegations of systematic racial exclusion from grand juries.[254]

### 3. *Selective Distrust of State Court Fact Finders*

Do these cases demonstrate that the Court does not really view the appellate role as restricted to the formulation of generally applicable rules after all? The answer depends on what one sees as the true rationale behind the decisions. These cases are not based on the importance of the first amendment rights at stake. It can scarcely be said that one's right to exhibit almost (but not quite) obscene films or one's right to

244. Consumers Union v. Bose Corp., 692 F.2d 189, 195 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984).

245. Bose Corp. v. Consumers Union, 461 U.S. 904 (1983). The Court assumed, without deciding, that the plaintiff loudspeaker manufacturer was a public figure, *Bose*, 466 U.S. at 492 n.8, and that the "actual malice" rule applies to a claim of product disparagement, *id.* at 513.

246. *Bose*, 466 U.S. at 510-11.

247. The Court noted that the non-deferential standard of review applies only to the "actual malice" determination; other trial court findings of fact are reviewable under the usual clearly erroneous standard. *Id.* at 514 n.31.

248. *Id.* at 510-11.

249. Time, Inc. v. Pape, 401 U.S. 279 (1971); New York Times v. Sullivan, 376 U.S. 254 (1964).

250. Jenkins v. Georgia, 418 U.S. 153 (1974); Miller v. California, 413 U.S. 15 (1973); Jacobellis v. Ohio, 378 U.S. 184 (1964); Roth v. United States, 354 U.S. 476 (1957).

251. Street v. New York, 394 U.S. 576 (1969).

252. Hess v. Indiana, 414 U.S. 105 (1973); Fiske v. Kansas, 274 U.S. 380 (1927).

253. Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963).

254. *See, e.g.*, Michel v. Louisiana, 350 U.S. 91 (1955); Norris v. Alabama, 294 U.S. 587 (1935).

publish disparaging product reviews somehow scores higher in the constitutional calculus than the right of black children to attend desegregated public schools.

Instead, these decisions were motivated by a distrust of state court fact finders as guardians of federal constitutional rights. Professor Monaghan has put it aptly:

> The need to guard against systemic bias brought about or threatened by other actors in the judicial system appears to be an important force behind the Supreme Court's exercise of constitutional fact review. It is no accident that the most salient modern examples of constitutional fact review are found in Supreme Court review of the state courts.[255]

For example, between 1967 and 1973, the Court summarily reversed thirty-one judgments in obscenity cases by citation to *Redrup v. New York*.[256] Twenty-six of these had come from state court systems, often after the state supreme court had denied review.[257] This statistic is hardly surprising given the Court's obvious concern that local fact finders were applying varying local standards to determine the existence *vel non* of constitutional protections.[258]

It is not too difficult to discern the reason for the Court's distrust of the state court fact finders in most of the other cases. The fighting words case in which the Court exercised independent review, *Street v. New York*,[259] involved political protest. In 1966, after hearing that civil rights leader James Meredith had been shot by a sniper, the defendant went to a Brooklyn street corner and burned an American flag, saying, "If they let that happen to Meredith we don't need an American flag." He was convicted in state court of malicious mischief.[260] One of the incitement cases in which the Court exercised independent review, *Hess v. Indiana*,[261] involved an antiwar protest on a college campus. After the police had cleared a street of protesters, the defendant yelled, "We'll take the fucking street later." He was arrested and convicted of disorderly conduct.[262]

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255. Monaghan, *supra* note 19, at 272.

256. 386 U.S. 767 (1967).

257. The only five from the lower federal courts were Childs v. Oregon, 401 U.S. 1006 (1971); Central Magazine Sales, Ltd. v. United States, 389 U.S. 50 (1967); Potomac News Co. v. United States, 389 U.S. 47 (1967); Books, Inc. v. United States, 388 U.S. 449 (1967); and Aday v. New York, 388 U.S. 447 (1967).

258. *See supra* text accompanying note 230.

259. 394 U.S. 576 (1969).

260. *Id.* at 579.

261. 414 U.S. 105 (1973).

262. *Id.*

In another incitement case, *Fiske v. Kansas*,[263] the defendant had attempted to recruit workers into a branch of the Industrial Workers of the World, which advocated workers' taking over the means of production and the abolition of the wage system. He was convicted of criminal syndicalism.[264] The political flavor of the civil rights demonstration cases is unmistakable. In *Cox v. Louisiana*[265] the defendant had led a group of about two thousand demonstrators into downtown Baton Rouge in December 1961. The group was protesting racial segregation and the arrest of other anti-segregation protesters. The defendant was convicted at a bench trial of disturbing the peace, obstructing public passages, and picketing before a courthouse.[266] The Supreme Court reversed the convictions. Justice Goldberg's opinion for the Court stated, "[W]e cannot avoid our responsibilities by permitting ourselves to be 'completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding.' "[267] In *Edwards v. South Carolina*,[268] black high school and college students demonstrated on the State House grounds in Columbia in March 1961. After singing religious and patriotic songs for awhile, they were arrested and convicted of breach of the peace.[269]

In all of these cases, the Supreme Court had reason to believe that state court fact finders were hostile to the defendants' political views and that this hostility had prejudiced their legal conclusions with respect to asserted federal constitutional rights. Thus, in the exercise of its unique jurisdiction over state court judgments,[270] the Court conducted a nondeferential review to ensure that the asserted constitutional rights had

263. 274 U.S. 380 (1927).

264. *Id.* at 381.

265. 379 U.S. 536 (1965).

266. *Id.* at 538.

267. *Id.* at 545 n.8 (quoting Haynes v. Washington, 373 U.S. 503, 515-16 (1963)).

268. 372 U.S. 229 (1963).

269. *Id.* at 230-33.

270. 28 U.S.C. § 1257(a) provides that "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had" may be reviewed by writ of certiorari. Though lower federal courts may in effect review state court judgments by way of habeas corpus, 28 U.S.C. § 2254 (1988), or by way of an injunction against the enforcement of a state court judgment when such relief would fall within an exception to the Anti-Injunction Act, 28 U.S.C. § 2283 (1988), and within an exception to the abstention doctrine of Younger v. Harris, 401 U.S. 37 (1971), the lower federal courts have no general power to review state court judgments. *See* Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281 (1970).

been properly weighed in the application of law to facts. Even the defamation cases, *Bose*[271] and *Time, Inc. v. Pape*,[272] can be seen merely as reflexive applications of the independent review practice.[273] Both cases reached the Supreme Court by way of the lower federal courts, not the state courts. However, the case upon which both opinions rely for their warrant to engage in independent review of the application of law to facts—*New York Times v. Sullivan*[274]—clearly fits into the mold of defamation cases discussed above.

Non-deferential review in these instances, however, amounts to little more than supervising the handiwork of state court fact finders suspected of acting in bad faith. It falls well short of disproving the broad notion that the proper role of an appellate court is restricted to formulating general rules. At most, these instances reflect the complex dimensions of the Supreme Court's unique role in the constitutional plan—a role that places the Court at the apex of two sets of courts with distinctly different institutional personalities and competencies.[275] There is no reason why this exceptional practice should enjoy wider use by federal courts of appeals or by the Supreme Court itself in cases that come up through the federal courts.

## V. IMPLICATIONS FOR THE MIXED QUESTIONS PROBLEM

If the appellate fact-finding and school desegregation cases endorse the conception of appellate review as restricted to the formulation of generally applicable rules, the next question is what implications should follow for the mixed questions problem. Using a concrete fact pattern as an

271. Bose Corp. v. Consumers Union, 466 U.S. 485 (1984); *see supra* text accompanying notes 242-54.

272. 401 U.S. 279 (1971); *see supra* text accompanying notes 242-54.

273. *See Bose*, 466 U.S. at 518 n.2 (1984) (Rehnquist, J., dissenting) (suggesting that *Pape*, 401 U.S. 279, represents the reflexive application of independent review doctrine out of its proper context).

274. 376 U.S. 254 (1964). *Sullivan* grew out of the black student demonstrations in the South in early 1960. When Martin Luther King was charged with perjury, the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South" took out a full-page advertisement in the *Times*, entitled "Heed Their Rising Voices." The ad falsely described and exaggerated law enforcement's reactions to the demonstrators, including events that had transpired in Montgomery, Alabama. A Montgomery city commissioner brought a libel action against the newspaper and against the four clergy members who had placed the ad. Although it was exceedingly difficult to ascertain which law enforcement officials the ad referred to, and though the plaintiff made no effort to prove that he had suffered any actual pecuniary loss, the jury awarded the full prayer, $500,000. *Id.* at 256-60.

275. *See* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1121-24 (1977) (arguing that federal district judges are generally more technically competent and have better resources than state trial judges).

illustration, this Article concludes that the restricted conception of appellate review compels appellate courts to apply only the "clearly erroneous" standard to findings on mixed questions of law and fact unless, in a particular case, review of such findings would produce meaningful precedent.[276] Put another way, if an appellate court can create a meaningful precedent when it reverses or otherwise sets aside a district court finding, then the standard of review should be de novo. In all other circumstances the "clearly erroneous" standard should govern review.

### A. ILLUSTRATION: *CLEVENGER V. OAK RIDGE SCHOOL BOARD*

The Sixth Circuit's decision in *Clevenger v. Oak Ridge School Board*[277] illustrates how this test would work in practice. Richard Clevenger was a seriously emotionally disturbed nineteen-year-old. The school board in Oak Ridge, Tennessee, had decided to place him at Riverbend, a residential school in Knoxville that offered psychiatric treatment. Richard's mother disagreed with the board's decision. Richard had been placed at Riverbend twice before, the last time when he was fourteen. He had been discharged for extreme uncooperativeness, and his mother wanted him to be placed at the Brown School in San Marcos, Texas.[278] She challenged the board's decision before a state hearing officer, who rejected her request. She then brought an action on Richard's behalf in federal district court seeking an injunction to force the board to place Richard at the Brown School.[279] The action was brought under the Education for All Handicapped Children Act, which requires recipients of its funding to provide a "free appropriate public education" for all children between ages three and twenty-one.[280] The board did not deny that it owed Richard a free, appropriate public education within the meaning of the Act, but argued that Richard's placement at Riverbend satisfied that legal duty.

Four mental health care professionals testified at the hearing.[281] Three of them testified that Riverbend was an inappropriate placement for Richard. The fourth, the school board's psychologist, testified that

276. By "meaningful precedent" I simply mean a decision that the appellate judge believes some future court will find to control the case before it. *See* Alexander, *supra* note 110, at 17-28.

277. 744 F.2d 514 (6th Cir. 1984).

278. *Id.* at 515.

279. Clevenger v. Oak Ridge School Bd., 573 F. Supp. 349, 351 (E.D. Tenn. 1983), *rev'd*, 744 F.2d 514 (6th Cir. 1984).

280. 20 U.S.C. § 1412 (1982).

281. The circuit court's opinion states only that four "psychiatrists/psychologists" testified. *Clevenger*, 744 F.2d at 515. The district court's opinion does not refer to any testimony. *Clevenger*, 573 F. Supp. at 351.

an educational program was "more or less irrelevant" to Richard's placement.[282] Rather, he opined, Richard's psychiatric problems required that he be placed in a mental institution, a need that Riverbend could fulfill. After hearing this testimony, the district court found that placement at Riverbend was "an appropriate placement under the provisions of the Education For All Handicapped Children Act" and dismissed the complaint.[283]

On appeal, the Sixth Circuit stated that the appropriateness *vel non* of Richard's placement at Riverbend presented a mixed question of law and fact.[284] The court then noted that in the Sixth Circuit mixed questions are "freely reviewable on appeal;"[285] however, it held that even if the "clearly erroneous" standard applied, the judgment had to be reversed because of a "complete lack of evidence in the record that Riverbend is the appropriate *educational* placement for Richard."[286] Since the court of appeals found that the judgment would have to be reversed even under the "clearly erroneous" standard, it did not need to decide between that standard and the de novo standard.

The Sixth Circuit opinion can be interpreted in at least two different ways. First, the court of appeals may have believed that the district court had misapprehended the applicable rule. The statutory language clearly required the school board, as a recipient of federal funding under the Act, to provide a "free appropriate public education" and not merely free psychiatric treatment. The school board psychologist—the only expert upon whose testimony the district court could have relied when it upheld the board's placement—had obviously written Richard off as a student and had focused only on the mental health care the state could give him.[287] The Sixth Circuit carefully noted that because the purpose of the Act was to guarantee qualified persons an appropriate education, the board psychologist's opinion "would not appear to merit a great deal of consideration."[288]

If the court of appeals intended to hold that the district court erred because it failed to consider whether Riverside provided an adequate education for Richard, then the correct standard of review was de novo.

282. *Clevenger*, 744 F.2d at 516.
283. *Clevenger*, 573 F. Supp. at 351.
284. *Clevenger*, 744 F.2d at 516.
285. *Id.* (citing K & M Joint Venture v. Smith Int'l, Inc., 669 F.2d 1106, 1111-12 (6th Cir. 1982)).
286. *Id.*
287. *See supra* text accompanying note 282.
288. *Clevenger*, 744 F.2d at 516.

Under this interpretation the holding was principled because it could be explained by reference to a generally applicable rule: When determining the appropriateness of a placement under the Act, a court may not base its decision on mental health factors to the exclusion of educational factors. If this were the holding, one could expect the *Clevenger* panel to realize that when courts within the Sixth Circuit subsequently decide cases involving the Act, they could not base placement decisions solely on psychiatric concerns.

And therein lies the constraint. The court would have had to know that other children with emotional and behavioral problems different from and perhaps worse than Richard's would be affected—who knows in what ways—by such a holding. A fair reading of the rule established by this holding would be that, no matter how serious or intractable the emotional or behavioral problems involved, a court may not uphold a placement decision under the Act unless that decision could be reconciled with the child's educational needs. If the court had found itself unable to live with the remorseless application of this rule, and if it were unable to explain its decision by reference to any other general rule, then highly deferential review would be required.[289] Since the court would have felt constrained to accept the results of this rule as applied to unknowable and unforeseeable children in the future, and nonetheless would have been willing to accept this precedential baggage in order to send Richard Clevenger to the Brown School, the court did not need to defer to the district court's decision.

De novo review would be proper under this view of the *Clevenger* court's holding. It is not simply that a determination of "appropriateness" within the meaning of the Education for All Handicapped Children Act involves a "question of law." Perhaps it does, but that is beside the point. That "appropriateness" may or may not be a "question of law" tells us nothing about why we ought to assign primary responsibility for the decision to the circuit court rather than to the district court. That allocative choice constitutes a normative question not addressed by any statute. Characterizing the salient issue as a "question of law" offers but an empty formalism.

The true reason non-deferential review is proper in the *Clevenger* case is that the Sixth Circuit was not simply getting a free shot at the equities of Richard Clevenger's case. The court was not free to decide merely on what it thought of Richard Clevenger, or his mother, or the

289. *See infra* text accompanying notes 292-93.

members of the school board, or their lawyers, or the school board psychologist, or the district judge. Nor was the court free to order Richard sent to the Brown School simply because it saw an unfortunate young man who had been through enough pain in two previous stays at Riverbend, and because it thought this school board was too hard hearted to spend the extra money for a more humane placement. The court had to pay a price for its decision. It had to accept the very real possibility that now hundreds of other school boards throughout the Sixth Circuit could not base their placement decisions solely on mental health care concerns, no matter what the psychiatric condition of the child involved, and no matter what the cost, even if it meant the expenditure of millions more taxpayer dollars.

To understand the nature and magnitude of this constraint one must contrast this scenario with one that would follow from a second possible interpretation of *Clevenger*. When the court stated that the judgment had to be reversed because there existed "a complete lack of evidence in the record,"[290] it may have meant that the facts established in the record supported the conclusion that Riverbend did not provide Richard Clevenger an "appropriate education" within the meaning of the Act. If this was the court's intended meaning, then it should have reviewed the district court's finding under the highly deferential "clearly erroneous" standard.

Note that this second interpretation can also be characterized as a "question of law." It could scarcely be denied that the question of whether Riverbend provided Richard an "appropriate education" requires the court to construe the statutory term "appropriate education." That may be an exercise of legal analysis and, therefore, an inquiry into a "question of law." However, the term still has nothing to say about why the appellate court should be given primary responsibility for the decision.

On the contrary, the Sixth Circuit should have reviewed the question of whether Riverbend provided Richard with an appropriate education under a "clearly erroneous" standard because *no other court would ever feel constrained by the decision*. Under such a standard, the Sixth Circuit's decision would never cause a single child to be placed in an institution that the court would have considered inappropriate. By limiting its holding to the facts in the record, the court is virtually free to decide the fate of Richard Clevenger. It is unimaginable that any other

290. *Clevenger*, 744 F.2d at 516.

court would allow such a holding to alter the disposition of future cases. Undoubtedly, if a future district court wished to overturn a school board decision and send an emotionally disturbed child to a more educationally oriented school, it would enthusiastically cite the Sixth Circuit's decision. That would not be *constraint* by precedent; it would be as if *Clevenger* had never been decided.[291] Undoubtedly, there are conscientious district judges in the Sixth Circuit who would feel compelled to distinguish *Clevenger* from their decisions to uphold school board determinations. However, a decision based entirely on evidentiary sufficiency viewing the record as a whole would not change the result in any other case. The *Clevenger* panel would never change the course of some other child's life simply because one day in September 1984, it held that Richard Clevenger should go to the Brown School instead of Riverbend.

### B. Inadequacy of Other Constraints

One might object that even if no other court could be bound by such a decision, the Sixth Circuit was nonetheless constrained by the language of the Education for All Handicapped Children Act. In other words, even if the court limited the scope of its decision to the facts before it, it was not free to interpret the words "free appropriate public education" as requiring, say, individual state-paid tutors and psychologists to visit Richard's home every weekday. It was no more free to interpret the Act in such a manner than was the court of appeals in *Pullman-Standard v. Swint*[292] free to interpret § 703(h) of Title VII as providing no immunity for a seniority system when discriminatory intent had not been shown. This objection would insist that an appellate court is always constrained by the authoritative text at issue and, therefore, it acts properly so long as it stays within that constraint.

This objection, however, iguores the way that adversary presentation shapes the process of adjudication. Appellate courts are indeed constrained by the text of statutes and constitutional provisions. However, an authoritative text will rarely deprive an appellate court of a relatively unfettered choice between the outcomes urged by the respective adversaries. The *Clevenger* court was not free, in any meaningful sense, to order state-paid tutors and psychologists for Richard. But that is not what Richard's attorneys had requested. They only requested that he be sent

291. *Cf.* Alexander, *supra* note 110, at 4 ("[P]ower of precedents to *support* decisions a court believes are otherwise justifiable depends upon the power of precedents to *constrain* a court from reaching decisions it believes are justifiable.").

292. 456 U.S. 273 (1982); *see supra* text accompanying notes 123-35.

to the Brown School. The Tennessee Attorney General requested that the court affirm the school board's decision to place Richard at Riverbend. It is no accident that the advocates confined their requests to the contours of the statute; they were well aware that such restraint was essential to winning the court's approval. Thus, insofar as the Sixth Circuit was inclined to decide the case in a non-principled manner and under a de novo standard, it had a free choice between the two schools. Because the statute had its effect prior to reaching the court's decision-making process, no authoritative text eliminated or even perceptibly narrowed the court's options. Neither side argued that Richard was not entitled to a "free appropriate public education." The court could easily have chosen either school without stretching the language of the Act.

This is not simply an observation that sometimes cases are close or that sometimes statutory language is open-ended. It is a general observation that, by the time a case gets to an appellate court, rarely will an authoritative text force the court's hand, at least between the parties' suggested outcomes. This means that the need to defer to statutory or constitutional pronouncements seldom provides the requisite constraint on appellate action *as it affects the litigants*. Counsel in most cases narrow their claims to fit the language of authoritative texts and they narrow them still more on appeal in response to their success or failure at the trial level. Thus, authoritative texts constrain advocates and the adjudicative process as a whole. But they do not constrain *the particular action that an appellate court engages in* when it selects an outcome to an appeal. Unless an appellate court is constrained by the need to decide in a principled manner or by a deferential standard of review, it will often appear that nothing constrains that action. And yet, achieving some apparent constraint on the decision-making process is an important step toward the attainment of real-world moral force in judicial pronouncements, since it is often so difficult to explain why—or even to know whether—a particular decision is actually correct.

## VI. FUTURE PROSPECTS/CONCLUSION

If the Supreme Court is to resolve the mixed questions conflict in a manner consistent with the proper conception of appellate function, it must adopt the "clearly erroneous" standard for appellate review of district courts' application of law to facts, except where such review would create meaningful precedent. Whether the Supreme Court should actually resolve the conflict at this time depends on at least a couple of factors. One factor concerns the value we assign to the resolution of

conflicts among the circuits generally. Some insist that such conflicts must be resolved soon after they arise; others believe that allowing them to "percolate" ultimately results in a better brew.[293] The other factor is how the Court views the conception of the appellate role that has emerged from the appellate fact-finding and school desegregation cases. Certainly appellate courts, like all courts, seek to do justice; but how often are their results more just between parties at bar than the results of trial courts? Meanwhile, one must ask whether the relative absence of constraining forces on appellate courts diminishes their credibility and prestige. In any event, if the Court reaffirmed this restricted conception of the appellate role, it would not be inconsistent with its practice of independent review of cases where state court fact finders are suspected of bearing hostility toward those asserting federal constitutional rights.

One could, however, expect a reaffirmation of this conception (in the course of resolving the general mixed questions conflict) to reverberate throughout standard-of-review jurisprudence. It appears already to have happened in the area of Rule 11 sanctions. In last Term's decision in *Cooter & Gell v. Hartmarx Corp.*[294] the Supreme Court held that a court of appeals "should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination."[295] *Cooter & Gell* is an utterly predictable progression from the *Pullman-Standard/Icicle Seafoods/Mucha v. King* approach. Since virtually every appellate review of Rule 11 sanctions requires an examination of highly particularized situations, and because of the overwhelming need for flexibility when disciplining a member of the bar, it is difficult to imagine non-deferential review of sanctions in a regime where unprincipled decisions are considered presumptively illegitimate. It would not be at all surprising to see the same approach adopted for decisions under such statutes as the Sentencing Reform Act[296] and the Bail Reform Act[297] and in negligence cases, where the application of law to facts could normally be expected to generate little of precedential value. Such an approach would bring those areas into line with the emerging coherent theory of the proper role of federal appellate courts.

293. *See* Schaefer, *Reducing Circuit Conflicts*, 69 A.B.A. J. 452, 454 (1983).
294. 110 S. Ct. 2447 (1990).
295. *Id.* at 2461.
296. 18 U.S.C. §§ 3551-3580 (1988).
297. 18 U.S.C. § 3142 (1988).